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A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS; TOGETHER WITH THEIR DUTIES, RIGHTS AND LIABILITIES AS CARRIERS

INCLUDING BOTH

STREET AND INTERURBAN RAILWAYS

By BYRON K. ELLIOTT
AND
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Authors of ROADS AND STREETS, GENERAL PRACTICE, EVIDENCE

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1885. Contributory negligence of flagmen and watchmen.
1886. Contributory negligence of section men and track laborers.
1887. Contributory negligence in mounting or alighting from moving cars.
1888. Contributory negligence in walking upon tracks.
1889. Contributory negligence in making "flying switches."
1890. Injuries to street railway employes.
1891. Contributory negligence of street railway employes.

§ 1820 (1266). **Introductory.**—It is our purpose in this chapter to treat of the class of persons employed by railroad companies usually denominated "servants" or "employes." We

do not propose to treat at large of the relation of master and servant, but, although it is our purpose to confine our discussion to the doctrine of master and servant only in so far as it applies to railroad companies in the capacity of employers, still it is necessary to an intelligent understanding of the subject to speak, incidentally, at least, of the general doctrine. We have elsewhere touched upon the subject.[1] There is a distinction between corporate representatives such as officers and agents[2] and servants or employes although it is very difficult to accurately mark the difference. Agents and officers, it may be said in a general way, represent the corporation to a much greater extent than do servants or employes although servants and employes are to a limited extent corporate representatives. The scope of authority is, as a rule, to be determined from the facts of the particular case and is usually a question of fact.[3] But the extent of the authority of an agent or employe may sometimes be a question of law to be determined by the court.[4] Whatever the rank or position of an employe, his acts within the line of his duty and scope of his authority will bind the corporation, but outside of that no matter how high his rank, the corporation will not be bound, so that in all cases the controlling question is, so far as concerns the doctrine of respondeat superior, what was the scope of the employe's authority? The question is not always, we may say by the way, whether there was actual authority, for if the employer has clothed the employe with the indicia of authority beyond that actually conferred he will usually be bound if the acts of the employe are within the limits of the apparent authority.

[1] Ante, Chapter VI, §§ 240, 271. Chapter XIII, §§ 325, 345. In a subsequent chapter we have discussed the statutory changes in the law of master and servant. Post, Chapter LVII. The present chapter deals with the general common law rules governing that subject.

[2] Ante, § 343. See also Abbott v. Lewis, 77 N. H. 94, 88 Atl. 98; Badger Oil Co. v. Preston, 49 Okla. 270, 152 Pac. 383.

[3] Ante, § 247.

[4] In the case of Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1, the court quoted from Elliott's General Practice, § 426, the following: "Where the facts are undisputed, or the authority is conferred by a writing, the scope of such authority is generally a question of law for the court." Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Ludwig v. Gor-

§ 1821 (1267). **Contract the basis of the employer's duty.**—The foundation of the employer's duty is a contract of service creating the relation of employer and employe.[5] The contract may create express duties and there are always implied duties.[6]

such, 154 Pa. St. 413, 26 Atl. 434; Nofsinger v. Ring, 4 Mo. App. 576; London &c. Society v. Hagerstown &c. Bank, 36 Pa. St. 498, 502, 78 Am. Dec. 390. See Arkansas &c. Ry. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. 54.

[5] Nimmo v. Walker, 14 La. Ann. 581; Baxter v. Gray, 4 Scott, N. R. 374; Gillshannon &c. v. Stonybrook R. Co., 10 Cush. (Mass.) 228; Mound City &c. Co. v. Conlon, 92 Mo. 221, 4 S. W. 922; Willis v. Toledo &c. R. Co., 72 Mich. 160. See also Christiansen v. Graves Tank Works, 223 Ill. 142, 79 N. E. 97; Louisville &c. R. Co. v. Pendleton, 31 Ky. L. 1025, 104 S. W. 382. But see where the company was held liable as an undisclosed principal. McClure v. Detroit &c. R. Co., 146 Mich. 457, 109 N. W. 847. "To constitute a servant, there must be some contract or some act on the part of the master, which recognizes the person as a servant." Rhodes v. Railroad Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. 362. As to when, if at all, a minor is prevented from recovery by misrepresentation as to his age see McDermott v. Iowa Falls &c. Ry. Co. (Iowa), 47 N. W. 1037; Hart v. New York Cent. &c. R. Co., 205 N. Y. 317, 98 N. E. 493; Norfolk &c. Ry. Co. v. Bondurant, 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N. S.) 443, 122 Am. St. 897. In Stafford v. Baltimore &c. R. Co., 262 Fed. 807, an adult who secured employment as a brakeman by procuring another to personate him and pass an examination required by defendant's rules, was apparently held precluded from recovery for an injury received while working as such brakeman, or at least a plea to that effect was held good as against a motion to strike it out.

[6] The cases holding the employer liable for a failure to exercise ordinary care in furnishing a safe place in which to work and safe appliances with which to work, are familiar examples of implied duty growing out of the contract of service. Mary Lee, &c. R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897, 53 Am. & Eng. R. Cas. 254; Gulf &c. R. Co. v. Johnson, 1 Tex. Civ. App. 103, 20 S. W. 1123; Gorham v. Kansas City &c. R. Co., 113 Mo. 408, 20 S. W. 1060; Meador v. Lake Shore &c. R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. 384; Harker v. Burlington &c. R. Co., 88 Iowa 409, 55 N. W. 316, 45 Am. St. 242; Dickson v. Omaha &c. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, and note, 46 Am. St. 429; Ragon v. Toledo &c. R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. 336. We have elsewhere considered the duty of the employer to provide safe working places and appliances and the cases there referred to show the nature of the implied duty arising out of the contract of service.

A wrongful breach of duty on the part of the employer will give a right of action to an employe for compensatory damages provided the employe is free from contributory fault.[7] But where there is no duty there can be no actionable negligence.[8] It is necessary, therefore, as a general rule, in order to create a duty in favor of one as the employe of another that the contract of service should embrace the act out of which the negligence arises.[9]

[7] Or, as Judge Thompson puts it: "If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master." 4 Thomp. Neg. § 3759, and numerous authorities there cited. Also cited in Lee v. St. Louis &c. R. Co., 112 Mo. App. 372, 87 S. W. 12.

[8] Kahl v. Love, 37 N. J. L. 5; Warner v. Railroad Co., 6 Phila. (Pa.) 537; Rich v. New York &c. R. Co., 87 N. Y. 382. See also Sutton v. Wabash R. Co., 152 Ill. App. 138; Maitrejean v. New Orleans &c. R. Co., 120 La. Ann. 1056, 46 So. 21; Yongue v. St. Louis &c. R. Co., 133 Mo. App. 141, 112 S. W. 985.

[9] See Missouri &c. R. Co. v. Texas &c. R. Co., 38 Fed. 816; Tustchell v. Grand Trunk &c. R. Co., 39 Fed. 419; Seese v. Northern Pac. R. Co., 39 Fed. 487; Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; Georgia R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. 308; Central R. Co. v. Lanier, 83 Ga. 587, 10 S. E. 279; Gorman v. Minneapolis &c. R. Co., 78 Iowa 509, 43 N. W. 303; Kansas City &c. R. Co. v. Kier, 41 Kans. 661, 21 Pac. 770, 13 Am. St. 311; Interstate &c. R. Co. v. Fox, 41 Kans. 715, 21 Pac. 797; Union Pac. R. Co. v. Springsteen, 41 Kans. 724, 21 Pac. 774; Guthrie v. Maine &c. R. Co., 81 Maine 572, 18 Atl. 295; Sobieski v. St. Paul &c. R. Co., 41 Minn. 169, 42 N. W. 863; Doyle v. St. Paul &c. R. Co., 42 Minn. 79, 43 N. W. 787; Smith v. Oxford &c. Co., 42 N. J. L. 467, 36 Am. Rep. 535; McGovern v. Central Vt. R. Co., 6 N. Y. S. 838; post, § 1869. In a recent case where a brakeman was injured by a piece of ice thrown by another brakeman who did not know that any one was present, it was held that it was necessary to allege that the brakeman who threw the ice was acting within the scope of his employment or in the line of his duty. Galveston &c. R. Co. v. Heney (Tex. Civ. App.), 99 S. W. 884. For work held to be within the scope of employment, see Union Pac. Ry. Co. v. Brereton, 218 Fed. 593. This section and section 1869 are cited in the dissenting opinion in Jackson v. Georgia &c. R. Co., 132 Ga. 127, 63 S. E. 841.

§ 1822 (1267a.) **Who are employes.**—It is sometimes difficult to determine whether a particular person is an employe to whom the duty of a master is owing. So, although one may be an employe in a general sense it is sometimes difficult to determine whether, at the time of injury, the relation existed and he was acting as such. The relation of mail clerks, express messengers and the like will be considered in another section, and so will that of volunteers and of employes while going to and from work and the like. But there are a few peculiar cases not elsewhere considered, and to these we now call attention. Persons frequently ride on engines or the like and perform services for the company, with its consent, for the purpose of learning the road and work, but without pay, in the mutual expectation of afterwards having regular employment. Such persons are frequently called "student" firemen, "student" brakemen, or the like, and it is held that they are employes.[10] An express messenger who also performed services for a railroad company as a baggageman, with its approval and consent has likewise been held to be an employe of such company.[11] So, there are other cases in which the same person may be an employe of two companies, being, for instance,

[10] Alabama &c. R. Co. v. Burks, 148 Ala. 113, 41 So. 638; Weisser v. Southern Pac. R. Co., 148 Cal. 426, 83 Pac. 439; Millsaps v. Louisville &c. R. Co., 69 Miss. 423, 13 So. 696. But compare Norfolk &c. R. Co. v. Bondurant, 107 Va. 515, 15 L. R. A. (N. S.) 443, 59 S. E. 1091, 122 Am. St. 867 (minor obtaining permission by misrepresenting age is at most a licensee). See also in support of text Smith v. Great Western &c. R. Co., 134 Ga. 216, 67 S. E. 818; Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Atchison &c. R. Co. v. Fronk, 74 Kans. 519, 87 Pac. 698, 11 Ann. Cas. 174. See also Barstow v. Old Colony R. Co., 143 Mass. 535, 10 N. E. 255. And so as to substitute, and not a mere volunteer, performing service of regular servant with consent of master, Aga v. Harbach, 140 Iowa 606, 117 N. W. 669; Yazoo &c. R. Co. v. Slaughter, 92 Miss. 289, 45 So. 873. Compare Gooch v. Citizens' Elec. St. R. Co., 202 Mass. 254, 88 N. E. 591, 23 L. R. A. (N. S.) 960n.

[11] Missouri &c. R. Co. v. Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332. See also Shannon v. Chesapeake &c. R. Co., 104 Va. 645, 52 S. E. 376.

a general servant of one and a special servant of another.[12] It has also been held that where two railroad companies receive cars from each other over a delivery track at a certain point, a person, employed by one of them to take the number of its cars and inspect their seals, as trains are made up by the other is to be deemed an employe of the latter within the meaning of a statute requiring every railroad company to adjust or block frogs, switches and guard-rails so as to prevent the feet of its employes from being caught therein.[13] But a sleeping car porter, employed and paid by the sleeping car company, which owned and controlled the car and was paid a compensation by the railroad company for running its car over the road, is not an employe of the railroad company.[14] So, one who has the

[12] Vary v. Burlington &c. R. Co., 42 Iowa 246; Nashville &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347. See also Floody v. Chicago &c. R. Co., 109 Minn. 228, 123 N. W. 815, 134 Am. St. 771, 18 Ann. Cas. 274; Westover v. Hoover, 88 Nebr. 201, 129 N. W. 285; Wiest v. Coal Creek R. Co., 43 Wash. 176, 84 Pac. 725. Sometimes the question is for the jury. Shultz v. Chicago &c. R. Co., 40 Wis. 589. See for case of joint liability where a railroad company rented a locomotive to a manufacturing company for exclusive use on the latter's premises, but selected the engineer and fireman, whose salaries were paid by the manufacturing company. Schoen v. Chicago &c. R. Co., 112 Minn. 38, 127 N. W. 433, 45 L. R. A. (N. S.) 841n.

[13] Atkyn v. Wabash R. Co., 41 Fed. 193. As to duty and liability to employes of another company upon whose track it is operating or where they operate on the same track, see Cleveland &c. R. Co. v. Berry, 152 Ind. 607, 53 N. E. 453, 46 L. R. A. 33, and note; Byrne v. Kansas City &c. R. Co., 61 Fed. 605, 24 L. R. A. 693; Atwood v. Chicago &c. R. Co., 72 Fed. 447; Dean v. East Tenn. &c. R. Co., 98 Ala. 586, 13 So. 489; Chicago &c. R. Co. v. Stephenson, 33 Ind. App. 95, 69 N. E. 270; Miller v. Minnesota &c. R. Co., 76 Iowa 655, 39 N. W. 188, 14 Am. St. 258; 4 Thomp. Neg. § 3730. See also Union R. Co. v. Tate, 151 Fed. 550; Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Feneff v. Boston &c. R. Co., 196 Mass. 575, 82 N. E. 705; Floody v. Chicago &c. R. Co., 109 Minn. 228, 123 N. W. 815, 134 Am. St. 771, 18 Ann. Cas. 274. But compare Yeates v. Illinois Cent. R. Co., 241 Ill. 205, 89 N. E. 338; Williams v. Kansas City &c. R. Co., 120 La. Ann. 870, 45 So. 924.

[14] Chicago &c. Ry. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 106 Am. St. 187, also holding that a contract between such porter and sleeping car company releasing the railroad companies over whose

privilege of entering cars to sell or furnish lunches or the like is not an employe, but is usually a bare licensee.[15]

§ 1823 (1268). Employer's duty to furnish a reasonably safe working place.—It is the doctrine of the modern cases, that the employer is bound to exercise ordinary or reasonable care to provide a reasonably safe working place for his employes,[16] and this duty is a personal one which can not be delegated so as to escape liability for a failure to perform it. But the master is not an insurer of the servant's safety, and is not at all hazards

lines the car was run, from liability for personal injuries is valid and binding. See also Robinson v. Baltimore &c. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849, and compare Pittsburgh &c. R. Co. v. Kinney, 95 Ohio St. 64, 115 N. E. 505, L. R. A. 1918B, 96n, Ann. Cas. 1918B, 286 and note. Whether employes of the sleeping car company are regarded as employes as between passengers and the railroad company is a different question.

[15] Fluker v. Georgia &c. R. Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. 328; Wencker v. Missouri &c. R. Co., 169 Mo. 592, 70 S. W. 145. And so one who goes on a train to purchase fruit from a news agent has been held a licensee. Peterson v. South &c. R. Co., 143 N. Car. 260, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. 799. See also for additional cases as to what is necessary to create the relation. Stevens v. Armstrong, 6 N. Y. 435; McCluskey v. Cromwell, 11 N. Y. 593, 599; Doyle v. Union Pac. Ry. Co., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. ed. 223; McCullough v. Shoneman, 105 Pa. St. 5, 51 Am. Rep. 194; Philadelphia &c. Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816.

[16] Wabash &c. R. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. ed. 605; Aerkfetz v. Humphrey, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. ed. 758; Choctawo & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 25, 48 L. ed. 96; Hunt v. Chicago &c. R. Co., 26 Iowa 363; Snow v. Housatonic &c. R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720, and note; Russell v. Minneapolis &c. R. Co., 32 Minn. 230, 20 N. W. 147; Cook v. St. Paul &c. R. Co., 34 Minn. 46, 24 N. W. 311; Gibson v. Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Patterson v. Pittsburgh &c. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Dillingham v. Crank, 87 Tex. 104, 27 S. W. 93; Galveston &c. R. Co. v. Goodwin (Tex. Civ. App.), 26 S. W. 1007; Bessex v. Chicago &c. R. Co., 45 Wis. 477; Hutchinson v. New York &c. R. Co., 5 Exch. 343. The text is cited in Cincinnati &c. R. Co. v. Gray, 101 Fed. 623, 50 L. R. A. 47, 53. But see post, § 1868, as to the rule where the servant is employed to make the place safe. The gen-

bound to provide or maintain an absolutely safe working place.[17] It is held in very many cases under the general rule stated, that the employer is bound to exercise ordinary care to put and keep the road bed and tracks in a reasonably safe condition.[18] Whether the employer is or is not liable for injuries caused by a defect in the working place depends, primarily, upon whether there was or was not negligence on the part of the employer. It is a mistake to suppose that evidence that a defect existed and that an accident occurred is sufficient to establish liability, for such evidence must usually be supplemented by evidence of

eral rule is elementary and it is unnecessary to cite additional authorities. Most of the recent ones are cited in White's Supp. to Thomp. Neg. §§ 3758, 3873, et seq. For what is said to be a clear and felicitous statement of the principles by which the master's liability is to be determined at common law in the disputed territory between the rule as to the master's duty to furnish a safe place to work and the rule relieving the master from liability for negligence of a fellow servant, see Poos v. King Brewing Co., 101 Nebr. 491, 163 N. W. 840, L. R. A. 1918D, 515.

[17] Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. ed. 766; Delaware &c. R. Co. v. Troxell, 183 Fed. 373; Cleveland &c. R. Co. v. Snow, 37 Ind. App. 646, 74 N. E. 908 (citing text); Fuller v. Illinois Cent. R. Co., 138 Ky. 42, 127 S. W. 501; Ladd v. New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331; Anderson v. Michigan Cent. R. Co., 107 Mich. 591, 65 N. W. 585; Culver v. South Haven &c. R. Co., 138 Mich. 443, 101 N. W. 663, 664 (citing text); York v. Kansas City &c. R. Co., 117 Mo. 405, 22 S. W. 1081; Cotton v. North Carolina R. Co., 149 N. Car. 227, 62 S. E. 1093; Norfolk &c. R. Co. v. Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367. See also Devlin v. Wabash R. Co., 87 Mo. 545; McKee v. Chicago &c. R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817; Patton v. Southern R. Co., 82 Fed. 979; Hach v. St. Louis &c. R. Co., 117 Mo. App. 11, 93 S. W. 825, 827 (citing text); American Bridge Co. v. Bainum, 146 Fed. 367.

[18] Fagundes v. Central &c. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; St. Louis &c. R. Co. v. Weaver, 35 Kans. 412, 11 Pac. 408, 57 Am. Rep. 176, and note; Snow v. Housatonic &c. R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720, and note; Lewis v. St. Louis &c. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Bowen v. Chicago &c. R. Co., 95 Mo. 268, 8 S. W. 230; Vautrain v. St. Louis &c. R. Co., 8 Mo. App. 538; Hardy v. Carolina &c. R. Co., 76 N. Car. 5; O'Donnell v. Allegheny &c. R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Calvo v. Charlotte &c. R. Co., 23 S. Car. 526, 55 Am. Rep. 28 28 Am. & Eng. R. Cas. 327; Walling v Congaree &c. R. Co., 41 S. Car 388, 19 S. E. 723; Houston &c. R. Co. v. Dunham, 49 Tex. 181; Gal-

negligence and by evidence that the negligence was the proxi-

veston &c. R. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Davis v. Central &c. R. Co., 55 Vt. 84, 45 Am. Rep. 590; Tonans &c. R. Co. v. Richmond &c. R. Co., 84 Va. 192, 4 S. E. 339; Bessex v. Chicago &c. R. Co., 45 Wis. 477; Hulehan v. Green Bay &c. R. Co., 68 Wis. 520, 31 Am. & Eng. R. Cas. 322. See also Kansas City &c. R. Co. v. Webb, 97 Ala. 157, 11 So. 888; Valley R. Co. v. Keegan, 87 Fed. 849; Lake Erie &c. R. Co. v. Morrisey, 177 Ill. 376, 52 N. E. 299; Pennsylvania Co. v. Brush, 130 Ind. 347, 28 N. E. 615; Chicago &c. R. Co. v. Dinius, 170 Ind. 222, 84 N. E. 9; Pennsylvania Co. v. Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 303; Chicago &c. R. Co. v. Lee, 29 Ind. App. 480, 64 N. E. 675 (but not extraordinary care nor the highest degree of care); Louisville &c. R. Co. v. Victory, 104 Ky. 509, 47 S. W. 440; Cincinnati &c. R. Co. v. Zachary, 32 Ky. L. 678, 106 S. W. 842; Eastman v. Lake Shore &c. R. Co., 101 Mich. 597, 60 N. W. 309; Fisher v. Chesapeake &c. R. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954, and note. Other recent cases to the same effect are cited in White's Supp. to Thomp. Neg. § 4254, et seq. But compare Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069, and cases cited, and see post, § 1829. As to liability and to assumption of risks in such cases under Federal Employers Liability Law, see Kansas City &c. R. Co. v. Roe (Okla.), 180 Pac. 371, 373, 375, and cases there cited. It has been held that the company owes a servant, engaged in loading cylinders with a derrick car, the duty of exercising ordinary care to supply a reasonably safe track for that particular work, and that it is not sufficient that it furnish and keep the track in such repair as a track is usually kept in for the purpose of running trains over it. Texas Cent. R. Co. v. George, 40 Tex. Civ. App. 267, 89 S. W. 1090. But it has also been held that so far as its employes are concerned the company is under no obligation to repair its track, which has become unsafe, provided due and timely notice of such defect is given so that the employes may avoid the danger. St. Louis &c. R. Co. v. Mize, 79 Ark. 629, 95 S. W. 488. And where a railroad fireman, employed in removing snow from the track, was killed by a derailment of the locomotive, and it appeared that a week before the accident the railroad had a gang of men shoveling snow from the track, who removed the loose snow but allowed patches of ice as high as the top of the rails to remain, and a day or two before the accident, there was another fall of snow, and on the day of the accident it was attempted to remove the snow by a snow plow propelled by locomotives, it was held that the liability of the railroad depended on the question whether it was negligent in the conduct of the work, and not whether it was negligent in failing to furnish a safe place to work. Neagle v. Syracuse &c. R. Co., 185 N. Y. 270, 77 N. E. 1064.

mate cause of the injury.[19] It has also been held that there is no liability for injuries caused by the condition of the road bed if the company has furnished and maintained one as good as others in general use,[20] but this is not always conclusive, nor is evidence as to what others have or have not done always admissible.[21] A railroad company is not liable for injuries resulting from the act of a wrong-doer in making the track unsafe.[22] We suppose, however, that the company would be liable if it neglected for an unreasonable time after notice of the act of the wrong-doer, or after it ought to have taken notice, to use ordinary care and diligence to make the track safe or to warn its employes.

§ 1824 (1269). **Structures near the track.**—Many courts hold that structures erected or suffered to remain so near the track as to endanger the safety of employes while engaged in the performance of duties required of them by their contract of service constitute a breach of the employer's duty to exercise ordinary care to put and keep the working place in a reasonably

[19] Ragon v. Toledo &c. R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. 336; LaPierre v. Chicago &c. R. Co., 99 Mich. 212, 58 N. W. 60; Burnes v. Kansas City &c. R. Co., 129 Mo. 41, 31 S. W. 347; Mickee v. Walter A. Wood &c. Co., 71 Hun 569, 28 N. Y. S. 918; Nutt v. Southern &c. R. Co., 25 Ore. 291, 35 Pac. 653; Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771. In Mobile &c. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416, 417, the text is cited in support of the proposition that liability does not depend upon the existence of danger, but upon the existence of negligence on the part of the employer.

[20] Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200. See Chicago &c. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921; Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626, 74 N. E. 1003; Mayer v. Detroit &c. R. Co., 142 Mich. 459, 105 N. W. 888; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388; Law v. Central Dist. Print. Co., 140 Fed. 558.

[21] See Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; Chicago &c. R. Co. v. Moore, 166 Fed. 663, 23 L. R. A. (N. S.) 962; Indiana &c. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175. But compare Doyle v. St. Paul &c. R. Co., 42 Minn. 79, 43 N. W. 787. See generally 3 Elliott Ev. § 2505.

[22] Illinois &c. R. Co. v. Quirk, 51 Ill. App. 607. See also Bennett v. Long Island R. Co., 21 N. Y. App. Div. 25, 47 N. Y. S. 258. And compare Jennett v. Louisville &c. R. Co., 162 Fed. 392.

safe condition for use.[23] Other courts, however, hold that the risk from structures near the track is one of the risks of the service which the employe assumes.[24] It seems to us that where

[23] Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88, 53 Am. & Eng. R. Cas. 115; Humphfres v. Western Pac. Ry. Co., 173 Cal. 428, 160 Pac. 415, 418 (citing text); Chicago &c. R. Co. v. Russell, 91 Ill. 298, 33 Am. Rep. 54; South Side Elev. R. Co. v. Nesvig, 214 Ill. 463, 73 N. E. 749 (even though on premises of another outside right of way company is negligent if it places its track or continues to operate its cars in dangerous proximity thereto); Indianapolis Trac. &c. Co. v. Holtsclaw, 41 Ind. App. 520, 82 N. E. 986 (to same effect as Illinois case); Allen v. Burlington &c. R. Co., 57 Iowa 623, 11 N. W. 614; Rouse v. Ledbetter, 56 Kans. 348, 43 Pac. 249; Southern Kans. R. Co. v. Michaels, 57 Kans. 474, 46 Pac. 938; Williams v. Atlantic &c. R. Co., 140 N. Car. 623, 53 S. E. 448; Stoltenburg v. Pittsburgh &c. R. Co., 165 Pa. St. 377, 30 Atl. 980; Gates v. Chicago &c. R. Co., 4 S. Dak. 433, 57 N. W. 200; Southern &c. R. Co. v. Markey (Texas), 19 S. W. 392; Ft. Worth &c. R. Co. v. Graves (Tex. Civ. App.), 21 S. W. 606; Texas &c. R. Co. v. Hohn, 1 Texas Civ. App. 36, 21 S. W. 942; Piddock v. Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131 and note; Kelleher v. Milwaukee &c. R. Co., 80 Wis. 584, 50 N. W. 942. See Seagel v. Chicago &c. R. Co., 83 Iowa 380, 49 N. W. 990; Choctaw & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct 24, 48 L. ed. 96 (holding it negligence as a matter of law to maintain an iron spout attached to a water tank so as to constitute a constant menace to its employes when it might just as well have been so placed as to be safe); Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382; East Tennessee &c. R. Co. v. Thompson, 94 Ala. 636, 10 So. 280; Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780, 782 (citing text); Louisville &c. R. Co. v. Hahn, 135 Ky. 251, 122 S. W. 142; Northern Cent. R. Co. v. State, 117 Md. 482, 83 Atl. 396; Clay v. Chicago &c. R. Co., 104 Minn. 1, 115 N. W. 949; Stackman v. Chicago &c. R. Co., 80 Wis. 428, 50 N. W. 404. See also Boston &c. R. Co. v. Gokey, 149 Fed. 42; Heilig v. Southern R. Co., 152 N. Car. 469, 67 S. E. 1009; Buchanan v. Lumber Co., 168 N. Car. 40, 84 S. E. 50; McDuffee v. Boston &c. R. Co., 81 Vt. 52, 69 Atl. 124, 130 Am. St. 1019; and see note to East St. Louis &c. Ry. Co. v. Kath, 232 Ill. 126, 83 N. E. 533, in 15 L. R. A. (N. S.) 1109, as to trolley poles too near track.

[24] Lovejoy v. Railroad Co., 125 Mass. 79, 28 Am. Rep. 206; Fisk v. Fitchburg &c. R. Co., 158 Mass. 238, 33 N. E. 510; Thain v. Old Colony R. Co., 161 Mass. 353, 37 N. E. 309; Goodes v. Boston &c. R. Co., 162 Mass. 287, 38 N. E. 500; Austin v. Boston &c. R. Co., 164 Mass. 282, 41 N. E. 288; Sisco v. Lehigh &c. R. Co., 145 N. Y. 296,

the employe has knowledge or is chargeable with knowledge of the existence and situation of such structures he assumes the risk of dangers from them, for we can see no reason why the general rule that an employe assumes the risk of the dangers of the service does not apply,[25] but if the employe does not know of the danger or is not chargeable with knowledge of it and it is caused by the employer's negligence, without contributory negligence on the part of the employe, the employer is liable.[26] If the structure or obstruction has not been

39 N. E. 958; Davis v. Columbia &c. R. Co., 21 S. Car. 93; Scidmore v. Milwaukee &c. R. Co., 89 Wis. 188, 61 N. W. 765; Seymour v. Maddox, 16 Q. B. 326; Ryan v. Canada &c. R. Co., 10 Ont. 745. See Jennings v. Tacoma &c. R. Co., 7 Wash. 275, 34 Pac. 937; McKee v. Chicago &c. R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817, 48 Am. & Eng. R. Cas. 154.

[25] Randall v. Baltimore & O. R. R. Co., 109 U. S. 478, 27 L. ed. 1003; Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114; East St. Louis &c. Ry. Co. v. Kath, 232 Ill. 126, 83 N. E. 533, 15 L. R. A. (N. S.) 1109n; Evansville &c. R. Co. v. Henderson, 142 Ind. 596, 42 N. E. 216; Pennsylvania Co. v. Finney, 145 Ind. 551, 42 N. E. 816; Content v. New York &c. R. Co., 165 Mass. 267, 43 N. E. 94; Jolly v. Detroit &c. R. Co., 93 Mich. 370, 53 N. W. 526; Wilson v. Lake Shore &c. R. Co., 145 Mich. 509, 108 N. W. 1021; Carr v. Grand Trunk R. Co., 152 Mich. 138, 115 N. W. 1068; Hughes v. Winona &c. R. Co., 27 Minn. 137, 6 N. W. 553; Walsh v. St. Paul &c. R. Co., 27 Minn. 367, 8 N. W. 145; Clark v. St. Paul &c. R. Co., 28 Minn. 128, 9 N. W. 581; Olson v. St. Paul &c. R. Co., 38 Minn. 117, 35 N. W. 866; Larson v. St. Paul &c. R. Co., 43 Minn. 423, 45 N. W. 722; Rains v. St. Louis &c. R. Co., 71 Mo. 164, 36 Am. Rep. 459; Gibson v. Erie R. Co., 63 N. Y. 449, 20 Am. Rep. 552; DeForest v. Jewett, 88 N. Y. 264; Drake v. Auburn &c. R. Co., 173 N. Y. 466, 66 N. E. 121; Moore v. Chattanooga Elec. R. Co., 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978; Missouri &c. R. Co. v. Somers, 71 Tex. 700, 9 S. W. 741. See generally Foley v. Jersey City Electric Light Co., 54 N. J. L. 411, 24 Atl. 487; Platt v. Chicago &c. R. Co., 84 Iowa 694, 51 N. W. 254. Some of the cases exonerate the employer on the ground of contributory negligence, but we think the true ground is that a known danger is one of the risks of the service.

[26] Scanlon v. Boston &c. R. Co., 147 Mass. 484, 18 N. E. 209, 9 Am. St. 732, distinguishing Ladd v. New Bedford &c. R. Co., 119 Mass. 412, 20 Am. Rep. 331; Yeaton v. Boston &c. R. Co., 135 Mass. 418; Leary v. Boston &c. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733 and note; Nugent v. Boston &c. R. Co., 80 Maine 62, 12 Atl. 797, 6 Am.

near the track a sufficient length of time for an employe to acquire, by the exercise of ordinary care, knowledge of the danger from it, and he has no warning of such danger, then there is, as we believe, an actionable breach of the employer's duty, provided the employer knows or is chargeable with knowledge of the danger, and has been guilty of negligence in not removing it or has been guilty of negligence in failing to warn the employe of the new or increased danger.[27] Railroad companies have often been held liable where land-slides and the like that ought to have been foreseen have injured employes and no proper inspection or precaution was taken or warning given.[28] Where the obstruction on or near the track is not placed there by the employer, then there is no breach of the employer's duty unless it is affirmatively shown that the employer was guilty of negligence in not removing the obstruction or was guilty of negligence in not warning the employe.[29] A temporary obstruction caused by cars breaking loose from a

St. 151; Leach v. Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90. See also Boston &c. R. Co. v. Gokey, 149 Fed. 42; Indianapolis Trac. &c. Co. v. Holtsclaw, 41 Ind. App. 520, 82 N. E. 986.

[27] St. Louis &c. R. Co. v. Biggs, 53 Ill. App. 550; Dixon v. Western Union Tel. Co., 71 Fed. 143; Martin v. Louisville &c. R. Co., 95 Ky. 612, 26 S. W. 801; Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88, 53 Am. & Eng. R. Cas. 115; Welch v. New York &c. R. Co., 17 N. Y. S. 342. See also Louisville &c. R. Co. v. Bouldin, 121 Ala. 197, 25 So. 903; Little Rock &c. R. Co. v. Voss (Ark.), 18 S. W. 172; Wilson v. New York &c. R. Co., 29 R. I. 146, 69 Atl. 364; Galveston &c. R. Co. v. Pitts (Tex. Civ. App.), 42 S. W. 255; Illinois Term. R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328; Chicago &c. R. Co. v. Stevens, 189 Ill. 226, 59 N. E. 577; Northern Ala. R. Co. v. Mansell, 138 Ala. 548, 36 So. 459. But in all cases where temporary obstructions are near the track the rule of non-liability for the negligence of the fellow-servants exerts an important influence.

[28] Fisher v. Chesapeake &c. R. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 452, 16 Sup. Ct. 618, 40 L. ed. 766; Bean v. Western N. Car. R. Co., 107 N. Car. 731, 12 S. E. 600.

[29] Lake Shore &c. R. Co. v. Brazzill, 2 Ohio Dec. 691. See also Fredericks v. Northern Cent. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306; Nashville &c. R. Co. v. Hayes, 117 Tenn. 680, 99 S.W. 362.

train is not within the general rule that the employer must provide a reasonably safe working place.[30] A distinction is made between cases where the obstruction is a temporary one, such as brush by the side of the track,[31] and cases where the structure is of a permanent nature.[32] We think that there is just ground for such a distinction, but that if the employe knows of the obstruction and does not exercise ordinary care to avoid injury from it he cannot recover. If the track runs through a forest where the trees are thick and can be readily seen and the dangers from them apprehended there is reason for holding that the employe assumes the risk,[33] and the same rule must apply where trees or bushes are growing along the right of way and employes have knowledge, or are chargeable with knowledge of their situation. Some of the courts seem to require proof of actual knowledge in order to exculpate the employer,[34]

[30] Jenkins v. Richmond &c. R. Co., 39 S. Car. 507, 18 S. E. 182, 39 Am. St. 750.

[31] Oregon &c. R. Co. v. Tracy, 66 Fed. 931, distinguishing Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150; Southern &c. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391; Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114. That company may be liable even for allowing rank grass to grow up along and between tracks so as to interfere with work of trainmen, see Burks v. Atchison &c. R. Co., 83 Kans. 144, 109 Pac. 1087; Texas &c. R. Co. v. Tuck, 103 Tex. 72, 123 S. W. 406.

[32] Babcock v. Old Colony R. Co., 150 Mass. 467, 23 N. E. 325; Eames v. Texas &c. R. Co., 63 Tex. 660; Hulehan v. Green Bay &c. R. Co., 68 Wis. 520, 32 N. W. 529; McClarney v. Chicago &c. R. Co., 80 Wis. 277, 49 N. W. 963; Union &c. R. Co. v. O'Brien, 49 Fed. 538. In Gaffney v. New York &c. R. Co., 15 R. I. 456, 7 Atl. 284, 31 Am. & Eng. R. Cas. 265, it is held that the employer is not liable where the placing of obstructions near the track is the act of a fellow-servant. See also Brown v. Minneapolis &c. R. Co., 31 Minn. 553, 18 N. W. 834, 15 Am. & Eng. R. Cas. 333; Hodgkins v. Eastern &c. Co., 119 Mass. 419; Brodeur v. Valley Falls R. Co., 16 R. I. 448, 17 Atl. 54.

[33] Manning v. Chicago &c. R. Co., 105 Mich. 260, 63 N. W. 312. But see Pittsburgh &c. R. Co. v. Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120.

[34] Dorsey v. Phillips &c. Construction Co., 42 Wis. 583; Johnson v. St. Paul &c. R. Co., 43 Minn. 53, 44 N. W. 884; Illinois Cent. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; Chicago &c. R. Co. v. Russell, 91 Ill. 298, 33 Am. Rep. 54. But see as to Illinois doctrine, Lake Shore &c. R. Co. v. O'Con-

but we think this view erroneous, for if the facts are such as make it negligence on the part of the employe not to know there can be no recovery.[35]

§ 1825. Objects near tracks—Illustrative and conflicting cases.—In many cases it has been held that the company was not liable either because it was not negligent, or because the plaintiff had assumed the risk or was guilty of contributory negligence, where the structure was not more than eighteen inches or two feet from passing cars,[36] and in others the company has been held liable where the structure was even farther from the

ner, 115 Ill. 254, 3 N. E. 501; Chicago &c. R. Co. v. Avery, 8 Ill. App. 133. See generally Sweet v. Michigan &c. R. Co., 87 Mich. 559, 49 N. W. 882. This last case, however, is explained and limited or overruled in Phelps v. Chicago &c. Ry. Co., 122 Mich. 171, 81 N. W. 101, 102, 103, 89 N. W. 66.

[35] O'Neal v. Chicago &c. R. Co., 132 Ind. 110, 31 N. E. 669; Pennsylvania Co. v. Finney, 145 Ind. 551, 42 N. E. 816; Muldowney v. Illinois &c. R. Co., 39 Iowa 615; McKee v. Chicago &c. R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817; Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780, 783 (for the jury, however); Wormell v. Maine &c. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321; Austin v. Boston &c. R. Co., 164 Mass. 282, 41 N. E. 288; Bell v. New York &c. R. Co., 168 Mass. 443, 47 N. E. 118; Batterson v. Chicago &c. R. Co., 53 Mich. 125, 18 N. W. 584; Illick v. Flint &c. R. Co., 67 Mich. 632, 35 N. W. 708; Phelps v. Chicago &c. Ry. Co., 122 Mich. 171, 81 N. W. 101, 102, 84 N. W. 66 (quoting text); Carr v. Grand Trunk R. Co., 152 Mich. 138, 115 N. W. 1068; Nashville &c. R. Co. v. Hayes, 117 Tenn. 680, 99 S. W. 362.

[36] Among the strongest or most extreme cases are: Kenney v. Meddaugh, 118 Fed. 209; New York &c. R. Co. v. Ostman, 146 Ind. 452, 45 N. E. 651; Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626, 74 N. E. 1003; Allen v. Burlington &c. R. Co., 64 Iowa 94, 19 N. W. 870; McKee v. Chicago &c. R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817; Ryan v. New York &c. R. Co., 169 Mass. 267, 47 N. E. 877; Sisco v. Lehigh &c. R. Co., 145 N. Y. 296, 39 N. E. 958; Kelly v. Baltimore &c. R. Co., 9 Sad. (Pa. St.) 48, 11 Atl. 659; Bellows v. Pennsylvania R. Co., 157 Pa. 51, 27 Atl. 685; Missouri Pac. R. Co. v. Somers, 71 Tex. 700, 9 S. W. 741. See also Davis v. Columbia &c. R. Co., 21 S. Car. 93; Wilson v. Louisville &c. R. Co., 85 Ala. 269; Chicago Term. R. Co. v. Schiavone, 216 Ill. 275, 74 N. E. 1048.

track.[37] If the employe knows of the location of an object near the track and the danger therefrom he must, ordinarily at least, be deemed to have assumed the risk.[38] But where trainmen have no knowledge of the existence of such objects too near the track and have not been warned they do not assume the risk, at least unless they ought to have obtained such knowledge themselves.[39] In a recent case an employe, injured while picking up tools between two tracks, claimed that he could recover because the company was negligent in having the tracks too close together, but the court held that he could not recover

[37] Among the strongest or most extreme cases permitting recovery are: Central Trust Co. v. East Tennessee R. Co., 73 Fed. 661; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382; Chicago &c. Ry. Co. v. Stevens, 189 Ill. 226, 59 N. E. 577; Baltimore &c. R. Co. v. Roberts, 161 Ind. 1, 67 N. E. 530; Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780; Whipple v. New York &c. R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. 796. The authorities in this and the preceding note are selected largely from the same jurisdiction in order to show how close to the line many cases fall and when such courts do or do not allow a recovery. Most of them are reviewed, with a statement of the facts and exact point decided, in Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626, 74 N. E. 1003. See also Denver &c. R. Co. v. Burchard, 35 Colo. 539, 86 Pac. 749, 9 Ann. Cas. 994.

[38] See McLeod v. New York &c. R. Co., 191 Mass. 389, 77 N. E. 715, 114 Am. St. 628; Carr v. Grand Trunk R. Co., 152 Mich. 138, 115 N. W. 1068; Lancaster v. Atchison &c. R. Co., 143 Mo. App. 163, 127 S. W. 607 (no liability where inspector struck by switch engine on adjoining track); Grover v. New York &c. R. Co., 76 N. J. L. 231, 69 Atl. 1082; Bowen v. Pennsylvania R. Co., 219 Pa. St. 405, 68 Atl. 963 (no liability where telegraph pole close to track); McDuffie v. Boston &c. R. Co., 81 Vt. 52, 69 Atl. 124, 130 Am. St. 1019 (no liability where trainman struck by water tank spout).

[39] See Norfolk &c. R. Co. v. Beckett, 163 Fed. 479 (standpipe); Chesapeake &c. R. Co. v. Cowley, 166 Fed. 283; Cloud v. Atchison &c. R. Co., 82 Kans. 851, 109 Pac. 400; Bradley v. Central Vt. R. Co., 196 Mass. 360, 82 N. E. 44; Mackenzie v. New York &c. R. Co., 211 Mass. 586, 98 N. E. 585 (risk of box car on side track dangerously near not assumed); Wilson v. New York &c. R. Co., 29 R. I. 146, 69 Atl. 364; Atchison &c. R. Co. v. Tack, 61 Tex. Civ. App. 551, 130 S. W. 596.

because, even if this was negligence, it was not a proximate cause of the injury.[40]

§ 1826 (1270). **Failure to fence.**—There is a conflict upon the question whether the failure of a railroad company to fence is such a breach of an employer's duty as gives an injured employe a right of action. The weight of authority, although, as yet, there is but scant authority upon the question, seems to support the doctrine that the company is liable.[41] But there are well-reasoned cases asserting a different doctrine.[42] It is somewhat difficult to successfully maintain the proposition that the duty to fence is owing to an employe, since that duty is created for a different purpose than that of protecting employes, but the duty is held to exist in favor of passengers,[43] and by analogy

[40] Paris &c. R. Co. v. Lackey (Tex. Civ. App.), 171 S. W. 540. The railroad company might possibly have successfully claimed also that the question sought to be raised was an engineering question. See Peters v. Bessemer &c. R. Co., 225 Pa. St. 307, 74 Atl. 61. The question of the location of switch stands has been held an engineering question and railroad companies have sometimes escaped liability on that ground. Chicago &c. R. Co. v. Riley, 145 Fed. 137, 7 Ann. Cas. 327; Chicago &c. Coal Co. v. Brooks, 138 Ill. App. 34. See also Dolge v. Northern Pac. R. Co., 107 Minn. 242, 119 N. W. 1066, 26 L. R. A. (N. S.) 600.

[41] Hayes v. Mich. Cent. R. Co., 111 U. S. 228, 4 S. Ct. 699, 28 L. ed. 410; Atchison v. Reesman, 60 Fed. 370, 23 L. R. A. 768; Magee v. North Pacific R. Co., 78 Cal. 430, 12 Am. St. 69; Terre Haute &c. R. Co. v. Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. 44; Dickson v. Omaha &c. R. Co., 124 Mo. 140, 27 S. W. 476, 46 Am. St. 429, 25 L. R. A. 320; Alexander v. Great Northern R. Co., 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E, 852; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Quackenbush v. Wisconsin &c. R. Co., 62 Wis. 411, 22 N. W. 519; ante, § 1707.

[42] Cowan v. Union Pac. R. Co., 35 Fed. 43; Gill v. Louisville &c. R. Co., 165 Fed. 438; Sweeney v. Central Pac. R. Co., 57 Cal. 15; Wabash R. Co. v. Brown, 5 Ill. App. 590; Bischoff v. Illinois &c. R. Co., 137 Ill. App. 33; Dewey v. Chicago &c. R. Co., 31 Iowa 373; Patton v. Central &c. R. Co., 73 Iowa 306, 35 N. W. 149; Fleming v. St. Paul &c. R. Co., 27 Minn. 111, 6 N. W. 448; Langlois v. Buffalo &c. R. Co., 19 Barb. (N. Y.) 364; McMillan v. Saratoga &c. R. Co., 20 Barb. (N. Y.) 449.

[43] Buxton v. North Eastern &c. R. Co., L. R. 3 Q. B. 549; Fordyce v. Jackson, 56 Ark. 594, 20 S. W.

the rule, perhaps, may be extended to employes. The question must, as we believe, depend largely upon the provisions of the statute,[44] and some of the cases heretofore cited are grounded on a statute. Where there is no statute giving a right of action, either expressly or impliedly, to injured employes, the rule, as we think, is that there is no liability, but on this question there is conflict of authority. We suppose that if the employe has knowledge of the fact that the road is not fenced, he must, in any event, under the general rule, be held to assume the risk. Unless so declared by statute there cannot, in our opinion, be a liability because of the bare fact that there is no fence, for the employer is not, as a general rule, liable unless the breach of duty is a negligent one.[45] If this general rule governs, then

528, 597; Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; Louisville &c. R. Co. v. Hendricks, 128 Ind. 462. In some of the cases the company has been held liable for a failure to fence to persons who wandered on the track, but we think it doubtful whether those cases are well decided. Keyser v. Chicago &c. R. Co., 56 Mich. 559, 56 Am. Rep. 405; Shuettgen v. Wisconsin &c. R. Co., 80 Wis. 498; Isabel v. Hannibal &c. R. Co., 60 Mo. 475. See Singleton v. Eastern Counties R. Co., 7 C. B. N. S. 287; Chicago &c. R. Co. v. Grablin, 38 Nebr. 90, 56 N. W. 787. It seems to us that there is no such specific duty owing to persons who without invitation, express or implied, go upon a railroad track, as enables them to recover upon the sole ground of a failure to fence the track.

[44] Manson v. Eddy, 3 Tex. Civ. App. 148; Cowan v. Union &c. R. Co., 35 Fed. 43. See Sands v. Linch, 122 Ark. 93, 182 S. W. 561, L. R. A. 1916E, 204, and note; Ward v. Bonner, 80 Tex. 168.

[45] The general rule is that the employe must "prove affirmatively the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employe." Erie &c. R. Co. v. Smith, 125 Pa. St. 259, 11 Am. St. 895; Mensch v. Pennsylvania &c. R. Co., 150 Pa. St. 598, 17 L. R. A. 450; Pennsylvania Co. v. Mason, 109 Pa. St. 296, 58 Am. Rep. 722; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; Pittston &c. Co. v. McNulty, 120 Pa. St. 414. See as to measure care required in the construction of cattle guards so as not to injure employes, Jensen v. Wisconsin Cent. R. Co., 145 Wis. 326, 128 N. W. 982. And upon the general subject of fencing and cattle guards see Aldrich v. Boston &c. R. Co., 91 Vt. 379, 100 Atl. 765; Jacoby v. Chicago &c. R. Co., 165 Wis. 610, 161 N. W. 751.

it is necessary in the absence of a statute creating an absolute liability, to supplement evidence of the failure to fence by evidence that there was negligence on the part of the company in not constructing and maintaining a fence.[46]

§ 1827 (1271). Bridges.—Bridges form part of the working place of train men and some other classes of railroad employes, and, generally, the rules which prescribe the duty of the employer as to the safety of the working place apply to bridges,[47]

[46] As to assumption of risk in such cases, see Nielsen v. Chicago &c. R. Co., 187 Fed. 393 (risk assumed); Terre Haute &c. R. Co. v. Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. 44 (risk not assumed where statute required fence); Alexander v. Great Northern R. Co., 51 Mont. 565, 154 Pac. 915, L. R. A. 1918E, 852 (risk not assumed).

[47] Texas &c. R. Co. v. Smith, 67 Fed. 524, 31 L. R. A. 321 and note; Terre Haute &c. R. Co. v. Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531; Bogart v. Delaware &c. R. Co., 145 N. Y. 283; Bolden v. Southern R. Co., 123 N. Car. 614, 31 S. E. 851; Knahtla v. Oregon &c. R. Co., 21 Ore. 136, 27 Pac. 91; Galveston &c. R. Co. v. Daniels, 1 Tex. Civ. App. 695, 28 S. W. 711; Bateman v. Peninsular R. Co., 20 Wash. 133, 54 Pac. 996; McCabe &c. Const. Co. v. Wilson, 17 Okla. 355, 87 Pac. 324 (quoting text). In the case last cited a quotation is also made from Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766, as follows: "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from a defective construction thereof, an injury happens to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guarantying or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations." And the following cases are cited: Hough v. Texas &c. R. Co., 100 U. S. 213, 25 L. ed. 612; Texas & P. R. Co. v. Cox, 146 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 359, 14 Sup. Ct. 140, 37 L. ed. 1107; Union P. Ry. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Chicago &c. R. v. Swett, 45 Ill. 197, 92 Am. Dec. 206; Toledo &c. R. v. Conroy, 68 Ill. 560; Snow

but there is much diversity of opinion upon one phase of the question. It is held by some of the courts that dangers from low bridges are not assumed as risks of the service.[48] Other courts assert a contrary doctrine.[49] The doctrine that dangers from low bridges are not risks assumed by employes is an

v. Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720; Huddleston v. Lowell Machine Shops, 106 Mass. 282; Stoher v. Iron Mountain R. Co., 91 Mo. 509, 4 S. W. 389; Paulmier &c. R. Co., 34 N. J. L. 151; Smith v. Harlem R. Co., 19 N. Y. 127, 75 Am. Dec. 305; Patterson v. Connelsville R. Co., 76 Pa. 389, 18 Am. Rep. 412. See also St. Louis &c. R. Co. v. Hill, 79 Ark. 76, 94 S. W. 914; Baltimore &c. R. Co. v. Keiser, 51 Ind. App. 58, 94 N. E. 330; Beaumont &c. R. Co. v. Olmstead, 56 Tex. Civ. App. 96, 120 S. W. 596. But compare Baylor v. Delaware &c. R. Co., 40 N. J. L. 23, 29 Am. Rep. 208. Where the employe has knowledge of the dangerous condition of a bridge and without complaint continues in the service, the general rule is, that he assumes the risk. Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 268. And it is not ordinarily the duty of the company to maintain barriers or similar safeguards to prevent an employe from falling off of a bridge or trestle. Harriman v. Chicago &c. R. Co., 147 Wis. 605, 133 N. W. 153, 50 L. R. A. (N. S.) 548, and note, citing and reviewing other cases.

[48] Chicago &c. R. Co. v. Carpenter, 56 Fed. 451; Chicago &c. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381; Baltimore &c. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Louisville &c. R. Co. v. Wright, 115 Ind. 378, 16 N. E. 145, 7 Am. St. 432; Pennsylvania &c. R. Co. v. Sears, 136 Ind. 460; St. Louis &c. R. Co. v. Irwin, 37 Kans. 701, 16 Pac. R. 146, 1 Am. St. 266; Cincinnati &c. R. Co. v. Sampson, 97 Ky. 65, 30 S. W. 12; Flanders v. Chicago &c. R. Co., 51 Minn. 193, 53 N. W. 544. See Anderson v. Northern Pac. R. Co., 34 Mont. 181, 85 Pac. 884; Miller v. Boston &c. R. Co., 73 N. H. 330, 61 Atl. 360; Darling v. New York &c. R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643, and note; West v. Chicago &c. R. Co., 179 Fed. 801 (not assumed unless the employe had actual or constructive knowledge not only of the existence of the bridge but also of the fact that it was dangerously low).

[49] Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; Stirk v. Central &c. R. Co., 79 Ga. 495, 5 S. E. 105; Wells v. Burlington &c. R. Co., 56 Iowa 520; Jones v. Louisville &c. R. Co., 82 Ky. 610; Baltimore &c. R. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Robel v. Chicago &c. R. Co., 35 Minn. 84; Baylor v. Delaware &c. R. Co., 40 N. J. L. 23, 29 Am. Rep. 208; Ryan v. Long Island &c. R. Co., 51 Hun (N. Y.) 607; Gibson v. Erie &c. R. Co., 63 N. Y. 449, 20 Am. Rep. 552; Williams v. Delaware &c. R. Co., 116 N. Y. 628, 22 N. E. 1117;

anomalous one, but it is not unfounded in reason. We suppose that the fact that an employe has knowledge of danger from a low bridge is always an important factor in cases where the question of contributory negligence is involved, for while the fact of such knowledge may not of itself establish contributory negligence, it may, in connection with other circumstances, establish such negligence, since the rule is, that care must be proportionate to the known danger. With knowledge of the character of the bridge and the danger from it, employes must exercise such care as time, opportunity and the like, render proper or they will be guilty of contributory negligence. Granting that the employe does not assume the risk of danger from low bridges, still, there may be such contributory negligence as will defeat a recovery, for if the employe knows the danger, he is under a duty to exercise care, and this duty requires him to exercise prudence and caution to avoid exposure to the known danger, so that if he voluntarily and without justification goes into a place that exposes him to injury he cannot recover.[50] But the risk is not assumed as a matter of law where the employe

Pittsburgh &c. R. Co. v. Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684; Atlee v. South Carolina R. Co., 21 S. Car. 550; Carbine v. Bennington &c. R. Co., 61 Vt. 348, 17 Atl. 491; Williamson v. Newport &c. R. Co., 34 W. Va. 657, 12 L. R. A. 297, 26 Am. St. 927. See Hines v. New York &c. R. Co., 78 Hun 239, 28 N. Y. S. 829; Cincinnati &c. Ry. Co. v. Jones, 192 Fed. 769, 47 L. R. A. (N. S.) 483 (company liable where employe struck, while on top of car in pursuance of duty, by roof of tunnel lower in middle than at ends). The authorities on the general subject are reviewed in the note to this case. Injury caused by insufficient ventilation of tunnel, no liability. Baltimore &c. R. Co. v. State, 75 Md. 152, 23 Atl. 310; Owen v. New York &c. R. Co., 1 Lans. (N. Y.) 108; Northern &c. R. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690, 12 Am. & Eng. R. Cas. 241.

[50] Schlaff v. Louisville &c. R. Co., 100 Ala. 377, 14 So. 105; Norfolk &c. R. Co. v. Marpole, 97 Va. 594, 34 S. E. 462. A brakeman who stands upon the top of a train which is approaching a low bridge is guilty of contributory negligence unless it affirmatively appears that some emergency or some extraordinary circumstances rendered his act in taking such a position excusable. Rock v. Retroff Co., 15 N. Y. Supp. 872. See Dukes v. Eastern &c. R. Co., 41 Hun 705, 4 N. Y. S. 562; Hall v. Union Pac. R. Co., 5 McCrary (U. S.) 257; Wells v. Burlington &c. R. Co., 56 Iowa 520; Baltimore &c. R. Co. v.

has no knowledge or warning and had never been near the bridge before.[51] It seems quite clear that there is a breach of the employer's duty where the company knows that its bridges are so low as to endanger the safety of persons it sends out upon its trains to discharge the duties required of them without warning or notice of such danger,[52] but it is somewhat difficult to defend the cases which hold that there is a duty to construct bridges of such a height as to enable employes on trains to pass under them in safety while standing on top of the cars, and that injury from low bridges is not assumed as one of the risks of the service. The general rule that the employe takes

Stricker, 51 Md. 47, 34 Am. St. 291; Riley v. Connecticut River R. Co., 135 Mass. 292; Warden v. Old Colony &c. R. Co., 137 Mass. 204; Murphy v. Boston &c. R. Co., 167 Mass. 64, 44 N. E. 1087; Devitt v. Pacific &c. R. Co., 50 Mo. 302; Rains v. St. Louis &c. R. Co., 71 Mo. 164, 36 Am. Rep. 459; Brossman v. Lehigh &c. R. Co., 113 Pa. St. 490, 57 Am. Rep. 479; Clark v. Richmond &c. R. Co., 78 Va. 709, 49 Am. Rep. 394; Sheeler v. Chesapeake, 81 Va. 188, 59 Am. Rep. 654.

[51] Boston &c. R. Co. v. Brown, 218 Fed. 625; Ft. Worth &c. R. Co. v. Kime, 21 Tex. Civ. App. 271, 51 S. W. 558. Whether the company was negligent and whether the employe riding on an extra high car assumed the risk when he knew of the bridge and that it was safe to ride on the top of ordinary cars were held questions for the jury in Southern Ry. Co. v. Carley (Ga. App.), 102 S. E. 35.

[52] Chesapeake &c. R. Co. v. Cowley, 166 Fed. 283; West v. Chicago &c. R. Co., 179 Fed. 801; Louisville &c. R. Co. v. Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. 432; Koller v. Chicago &c. R. Co., 113 Minn. 173, 129 N.W. 220; Louisville &c. R. Co. v. Thomas, 87 Miss. 600, 40 So. 257; Chesapeake &c. R. Co. v. Rowsey, 108 Va. 632, 62 S. E. 363. But compare Erie R. Co. v. McCormick, 69 Ohio St. 45, 68 N. E. 571; Neff v. New York &c. R. Co., 80 Hun 394, 30 N. Y. S. 323. As to warning by "whipping straps" or "telltales," required by some statutes, see Wallace v. Central Vt. R. Co., 138 N. Y. 302, 33 N. E. 1069; Fitzgerald v. New York Central &c. R. Co., 59 Hun (N. Y.) 225; Louisville &c. R. Co. v. Hall, 91 Ala. 113, 24 Am. St. 863 (not required unless by statute). As to injury from defective "telltale," see Warden v. Old Colony R. Co., 137 Mass. 204; Darling v. New York &c. R. Co., 17 R. I. 708, 16 L. R. A. 643, and note. Risk is ordinarily assumed where there are proper and efficient "telltales." Harrison v. New York &c. R. Co., 195 N. Y. 86, 87 N. E. 802. But see Chicago Terminal &c. R. Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133. See also Hollingsworth v. Chicago &c. R. Co., 160 Ind. 259, 65 N. E. 750; Koller v. Chicago &c. R. Co., 113

the risk of injury fully known to him[53] would seem to apply in a proper case to dangers from low bridges. In a recent case a doctrine similar to the "low bridge" doctrine was applied where a railroad conductor was struck, while in the proper performance of his duty on top of a car, by the overhanging limb of a tree, the court holding that it was the duty of the company to remove overhanging limbs when necessary to provide a safe working place, that danger therefrom was not a danger incident to the service, and that it was for the jury to say whether the employe had assumed the risk.[54]

§ 1828 (1271a). Narrow bridges.—A railroad company may be liable to any employe who is injured, without fault on his part, by a bridge that is too narrow to permit employes to perform their duties in the exercise of reasonable care with reasonable safety, where he has no warning and is not deemed to have assumed the risk, as well as for injuries caused by low bridges.[55] But if the bridge is a standard bridge of the usual

Minn. 173, 129 N. W. 220; Whitehead v. Wisconsin Cent. R. Co., 103 Minn. 13, 114 N. W. 254; McGarrity v. New York &c. R. Co., 25 R. I. 269, 55 Atl. 718; Boston &c. R. Co. v. Brown, 218 Fed. 625.

[53] Chicago &c. R. Co. v. Jackson, 55 Ill. 492; Indianapolis &c. R. Co. v. Watson, 114 Ind. 20, 5 Am. St. 578; Vincennes &c. R. Co. v. White, 124 Ind. 376, 24 N. E. 747; Pennsylvania Co. v. Brush, 130 Ind. 347, 28 N. E. 615; Evansville &c. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Ladd v. New Bedford &c. R. Co., 119 Mass. 412, 20 Am. Rep. 331; Kelley v. Silver Spring &c. R. Co., 12 R. I. 112; Dynen v. Leach, 26 L. J. N. S. Exch. 221; Seymour v. Maddox, 16 Q. B. 326; Senior v. Ward, 1 El. & El. 385; Assop. v. Yates, 2 H. & N. 768.

[54] Pittsburg &c. R. Co. v. Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120. See also South Side El. R. Co. v. Nesvig, 214 Ill. 463, 73 N. E. 749, where the company was held liable for injury caused by operating its trains too near a pole although the pole was erected by another company on its own ground. See also on the general subject of low bridges and assumption of risks, especially under Federal Employers' Liability Act, Nortan v. Maine Cent. R. Co., 116 Maine 147, 100 Atl. 598, reviewing Portland Terminal Co. v. Jarvis, 227 Fed. 8, and other federal cases.

[55] Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780. See also ante, § 1824, and post § 1829. Leach v. Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90.

width and the cars in question are of the usual width it would seem that there would, ordinarily, be no negligence in so maintaining a bridge that had long been found safe and suitable and that, as employes could not expect bridges to be wider than the standard and ordinary width they should be deemed to have assumed the risk. And there are authorities denying liability in such cases.[56]

§ 1829 (1272). Negligence of employer in failing to keep premises safe—Switch yards.—The general rule as to the duty of the employer to exercise ordinary care to make and keep working places reasonably safe for use applies to switch yards

[56] Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626, 74 N. E. 1003; Sheeler v. Chesapeake &c. R. Co., 81 Va. 188, 59 Am. Rep. 654; Illick v. Flint &c. R. Co., 67 Mich. 632, 35 N. W. 708. See also Wolf v. East Tenn. &c. R. Co., 88 Ga. 210, 14 S. E. 199; Bellows v. Pennsylvania &c. R. Co., 157 Pa. St. 51, 27 Atl. 685; Fulford v. Lehigh Valley R. Co., 185 Pa. St. 329, 39 Atl. 1115, and ante, § 1823. In Illick v. Flint &c. R. Co., 67 Mich. 632, 35 N. W. 708, 710, it is said: "A railroad company cannot be required to condemn and remove a bridge, which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of the railroad company to provide a track and equipments which will be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing." See also Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 1168, 30 L. ed. 1114; Sisco v. Lehigh &c. R. Co., 145 N. Y. 296, 300, 39 N. E. 958. But compare Clay v. Chicago &c. Ry. Co., 104 Minn. 1, 115 N. W. 951. And a bridge or roadway may be reasonably safe although it does not conform to the general standard. Northern Ala. Ry. Co. v. Mansell, 138 Ala. 548, 36 So. 459, 463, citing Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; Louisville &c. R. Co. v. Jones, 130 Ala. 456, 30 So. 586.

or yards where trains are made up;[57] so does the rule holding employes to the exercise of care,[58] and so also does the rule concerning the assumption of the risks of the service.[59] Yardmen or other employes whose duties require them to perform services in the yards of the company are entitled to the protection of the rule requiring the master to use ordinary care to make the working place reasonably safe but they are held to assume risks from defects known to them if they continue

[57] Randall v. Baltimore &c. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; Southerland v. Northern Pac. R. Co., 43 Fed. 646; Grant v. Union Pacific R. Co., 45 Fed. 673; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623, 50 L. R. A. 47, 53 (citing text); Chicago &c. R. Co. v. Kneirim, 152 Ill. 458, 43 Am. St. 259. See also Atchison &c. R. Co. v. Swarts, 58 Kans. 235, 48 Pac. 953; Northern Pac. R. Co. v. Teeter, 63 Fed. 527; Lake Erie &c. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Brooke v. Chicago &c. R. Co., 81 Iowa 504, 47 N. W. 74; Louisville &c. R. Co. v. Johnson's Admr., 161 Ky. 824, 171 S. W. 849; Boos v. Minneapolis &c. R. Co., 127 Minn. 381, 149 N. W. 660; Texas &c. R. Co. v. McCoy, 90 Tex. 264, 38 S. W. 36; Texas &c. R. Co. v. Guy (Tex. Civ. App.), 23 S. W. 633.

[58] Peoria &c. R. Co. v. Ross, 55 Ill. App. 638; Crisswell v. Montana &c. R. Co., 17 Mont. 189, 42 Pac. 767; Crawford v. Houston &c. R. Co., 89 Tex. 89, 33 S. W. 534; Loring v. Kansas City &c. R. Co., 128 Mo. 349, 31 S. W. 6.

[59] Naylor v. New York &c. R. Co., 33 Fed. 801; Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. ed. 758. See also Parker v. New York &c. R. Co., 18 R. I. 773, 30 Atl. 849; St. Louis &c. R. Co. v. Hynson, 101 Tex. 543, 109 S. W. 929. But while the risks incident to the employment at such a place are assumed, by a car checker, yet it has been held that where it was customary to give warning of the approach of cars kicked down on the track where he and other car checkers were at work, he had a right to rely on such custom and govern himself accordingly. Meadowcroft v. New York &c. R. Co., 193 Mass. 249, 79 N. E. 266. See also Pittsburg &c. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Grand Trunk &c. R. Co. v. Poole, 175 Ind. 567, 575, 93 N. E. 26. And there are of course many risks in particular cases from defects in ties or tracks or the like, with which trainmen are not chargeable with knowledge, which are not assumed. Southern R. Co. v. Bufkins, 45 Ind. App. 80, 89 N. E. 326, 90 N. E. 98; Smith v. Chicago &c. R. Co., 82 Kans. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255 and note, citing additional cases. Meehan v. St. Louis &c. R. Co., 114 Mo. App. 396, 90 S. W. 102.

in the service, except in cases where the master promises to repair.[60] As shown in the next section, it is generally held that the operation of a railroad without blocking the switches is not negligence. There is some conflict of authority upon the question as to the duty of the company to properly cover ditches and drains in its yards. Some of the cases hold that it is the duty of the company to use reasonable care in covering culverts and ditches,[61] while others assert a somewhat different doctrine.[62] It seems to us that it is the duty of the employer to use reasonable care to cover drains and ditches in yards where trains are made up and employes are required to couple and uncouple cars and to transfer cars from place to place.[63] We do not believe, however, that the duty extends to all places within the yard limits but only to places where the duties of their service require the yardmen and other employes to work. The rule which we favor does not, as we think, apply to places

[60] Scidmore v. Milwaukee &c. R. Co., 89 Wis. 188, 61 N. W. 765; McDugan v. New York &c. R. Co., 31 N. Y. S. 135; Albert v. New York &c. R. Co., 80 Hun 152, 29 N. Y. S. 1126; Gulf &c. R. Co. v. Hohl (Tex. Civ. App.), 29 S. W. 1131; Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154. See Linton &c. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440, 39 Am. Rep. 88; Quinn v. Chicago &c. R. Co., 107 Iowa 710, 77 N. W. 464; Narramore v. Cleveland &c. R. Co., 96 Fed. 298, 48 L. R. A. 68; Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391.

[61] Franklin v. Winona &c. R. Co., 37 Minn. 409, 34 N. W. 898, 5 Am. St. 856. See also St. Louis &c. R. Co. v. Mangan, 86 Ark. 507, 112 S. W. 168; Smith v. Boston &c. R. Co., 73 N. H. 325, 61 Atl. 359.

[62] Little Rock &c. R. Co. v. Townsend, 41 Ark. 382. But compare St. Louis &c. R. Co. v. Mangan, 86 Ark. 507, 112 S. W. 168.

[63] Gardner v. Michigan &c. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; denying the doctrine of Gardner v. Michigan &c. R. Co., 58 Mich. 584, 26 N. W. 301. See also Kerrigan v. Penna. R. Co., 194 Pa. St. 98, 44 Atl. 1069; Hollenbeck v. Missouri Pac. R. Co. (Mo.), 34 S. W. 494, 38 S. W. 723; Burdict v. Missouri Pac. R. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, and note, 45 Am. St. 528; Houston &c. R. Co. v. Pinto, 60 Tex. 516; Harr v. New York Cent. &c. R. Co., 114 N. Y. 623, 21 N. E. 1049. And see as to cattle guards and the like, Fredenburg v. Northern Cent. R. Co., 114 N. Y. 582, 21 N. E. 1049, 11 Am. St. 697; Sweat v. Boston &c. R. Co., 156 Mass. 284, 31 N. E. 296; Kennedy v. Lake

on the line of the road where switching is not customarily or habitually done, and danger from open drains and ditches at such places are ordinary incidental risks of the service assumed by the employes.[64] Where the employe knows, or is chargeable with knowledge that drains and ditches are uncovered then, under the general rule that employes assume the risks of the service he is usually deemed to assume the risk of danger from such drains and culverts.[65] A like difference of opinion exists as to ballasting tracks.[66] There are many cases holding that piles of cinders, or a hole between ties or the like, in the nature of a pitfall, will usually constitute a breach of the master's duty in such cases.[67] The duty of a railroad company to employes engaged in a switch yard was clearly and correctly defined in

Superior &c. Co., 93 Wis. 32, 66 N. W. 1137; Illinois Cent. R. Co. v. Sanders, 166 Ill. 270, 46 N. E. 799; Cregg v. Chicago &c. R. Co., 91 Mich. 624, 52 N. W. 62.

[64] Deforest v. Jewett, 88 N. Y. 264, 8 Am. & Eng. R. Cas. 495; Gibson v. Erie &c. R. Co., 63 N. Y. 449, 20 Am. Rep. 552; Couch v. Charlotte &c. R. Co., 22 S. Car. 557; Koontz v. Chicago &c. R. Co., 65 Iowa 224, 21 N. W. 577, 54 Am. Rep. 5, 18 Am. & Eng. R. Cas. 85; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388. See also Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069.

[65] Spencer v. New York &c. R. Co., 67 Hun 196, 22 N. Y. S. 100.

[66] Holding that no such duty exists or that the risk is assumed are Finnell v. Delaware &c. R. Co., 129 N. Y. 669, 29 N. E. 825; Philadelphia &c. R. Co. v. Schertle, 97 Pa. St. 420, 39 Am. Rep. 813; Batterson v. Chicago &c. R. Co., 53 Mich. 125, 18 N. W. 584; Pennsylvania Co. v. Hankey, 93 Ill. 580. But in some jurisdictions the contrary has been held as to tracks in yards. Texas &c. R. Co. v. Crowder, 70 Tex. 222, 7 S. W. 709; Bonner v. Hickey (Tex. Civ. App.), 23 S. W. 85; Gulf &c. R. Co. v. Redeker, 67 Tex. 181, 2 S. W. 513, See also St. Louis &c. R. Co. v. Robbins, 57 Ark. 377, 21 S. W. 886; Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652 (company liable where ballasted except at point of injury, which was in nature of pitfall). A track may be temporarily in bad condition while undergoing repair without making the company liable to employes. Cleveland &c. R. Co. v. Sloan, 11 Ind. App. 401, 39 N. E. 174; Smith v. Boston &c. R. Co., 73 N. H. 325, 61 Atl. 359.

[67] Illinois Cent. R. Co. v. Cozby, 174 Ill. 109, 50 N. E. 1011; Pittsburg &c. R. Co. v. Elwood, 25 Ind. App. 671, 58 N. E. 866, and other cases cited in Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 614, 103 N. E. 652.

a recent case by the supreme court of the United States,[68] where it was held that the company discharges its duty if it provides competent co-servants and prescribes such regulations "as experience shows may be best calculated to secure the safety" of employes.

§ 1830 (1272a.) Switch yards—Blocking frogs.—It is generally held that the operation of a railroad without blocking its frogs, switches or guard rails is not negligence.[69] It is certainly not negligence as a matter of law, in the absence of any statute upon the subject, although there are cases holding that the

[68] Central &c. R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418; citing and approving Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603. See also Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150. But compare Louisville &c. Ry. Co. v. Johnson's Admx., 161 Ky. 824, 171 S. W. 847.

[69] Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391, reversing Seley v. Southern Pacific R. Co., 6 Utah 319, 23 Pac. 751; Kilpatrick v. Choctaw &c. R. Co., 121 Fed. 11, affirmed in 195 U. S. 624, 25 Sup. Ct. 789, 49 L. ed. 349; Wabash R. Co. v. Kithcart, 144 Fed. 108; Donegan v. Baltimore &c. R. Co., 165 Fed. 869; Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. 245 and note; York v. St. Louis &c. R. Co., 86 Ark. 244, 110 S. W. 803; Banks v. Georgia R. &c. Co., 112 Ga. 655, 37 S. E. 992; Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440; Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154; Lane v. Missouri Pac. R. Co., 64 Kans. 755, 68 Pac. 626; McGinnis v. Canada &c. Bridge Co., 49 Mich. 466; Hewitt v. Flint &c. R. Co., 67 Mich. 61, 34 N. W. 659; Newlin v. St. Louis &c. R. Co., 222 Mo. 375, 121 S. W. 125; Missouri &c. R. Co. v. Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67 and note. In Chicago &c. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55, the court seems to hold that the company is not bound to use unblocked switches for the reason that the practice of blocking switches is nothing more than an experiment. The court, however, recognized as authority cases which declare that employers are not bound to discard appliances in use and procure more modern ones. See generally 4 Thomp. Neg. (2d ed.) § 3986, et seq. Spencer v. New York &c. R. Co., 67 Hun 196, 22 N. Y. S. 100. Gilbert v. Burlington &c. R. Co., 128 Fed. 533; Rush v. Missouri Pac. R. Co., 36 Kans. 129, 12 Pac. 582; Wilson v. Winona &c. R. Co., 37 Minn. 326, 33 N. W. 908, 5 Am. St. 851; Mayes v. Chicago &c. R. Co., 63 Iowa 562, 14 N. W. 340. In many of these cases it is also held that the risk

question is for the jury.[70] But if the company undertakes to block its frogs and allows them to become defective it may be liable to an employe who is injured thereby although it would not have been liable if it had not assumed any such duty.[71] So, where, as in some jurisdictions, a statute requires frogs and switches to be blocked the company will usually be liable to an employe who is injured by its failure to perform such duty, without fault on his part.[72] And this statutory duty is one that cannot be delegated so as to relieve the company from liability.[73]

§ 1831 (1273). Machinery and appliances—Master's duty respecting.—It is the duty of the master to exercise ordinary care to furnish the employes reasonably safe machinery and appli-

is one assumed by the employe. See also Wabash R. Co. v. Ray, 152 Ind. 392, 51 N. E. 920.

[70] Coates v. Burlington &c. R. Co., 62 Iowa 486, 17 N. W. 760; Huhn v. Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937; Missouri Pac. R. Co. v. Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67 and note; Hohem v. Chicago &c. R. Co., 80 Wis. 299, 50 N. W. 99. The text is quoted in St. Louis &c. R. Co. v. Long, 41 Okla. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432n; Contra, Kilpatrick v. Choctaw &c. R. Co., 121 Fed. 11, affirmed in 195 U. S. 624, 25 Sup. Ct. 789, 49 L. ed. 349, and other cases cited in last preceding note. In Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679, it was held that, while it was not negligence as matter of law, to fail to have a derailing switch, yet it was a question for the jury.

[71] Hunt v. Kane, 100 Fed. 256. See also Grand Trunk &c. R. Co. v. Poole, 175 Ind. 567, 93 N. E. 26; Turner v. Boston &c. R. Co., 158 Mass. 261, 33 N. E. 520.

[72] Cooper v. Baltimore &c. R. Co., 159 Fed. 82, 16 L. R. A. (N. S.) 715 n, 14 Ann. Cas. 693; Grand v. Michigan Cent. R. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; Ashman v. Flint &c. R. Co., 90 Mich. 567, 51 N. W. 645; Jones v. Flint &c. R. Co., 127 Mich. 198, 86 N. W. 838; Pittsburg &c. R. Co. v. Burroughs, 9 Ohio Dec. 324; Le May v. Canadian Pac. R. Co., 17 Ont. App. 293, 18 Ont. 314. See also Narramore v. Cleveland &c. R. Co., 96 Fed. 298, 48 L. R. A. 68 and note; Curtis v. Chicago &c. R. Co., 95 Wis. 460, 70 N. W. 665.

[73] Ashman v. Flint &c. R. Co., 90 Mich. 567, 51 N. W. 645; LeMay v. Canadian Pac. R. Co., 17 Ont. App. 293. As to its effect, if any, on assumption of risks, see note in 16 L. R. A. (N. S.) 719; also Denver &c. R. Co. v. Gannon, 40 Colo. 195, 11 L. R. A. (N. S.) 216 and note; also note to Denver &c. R. Co. v. Norgate, 141 Fed. 247, in 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

ances with which to work.[74] The duty is discharged if the employer exercises reasonable and ordinary care, although the machinery or appliances may not, in fact, be safe or free from defects.[75] The degree of care required is ordinary care, but to reach that degree it must be care reasonably proportionate to the dangers against which the employer is required to provide.[76]

[74] Washington &c. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. ed. 235; Texas &c. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; Baltimore & St. L. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391; Union Pac. R. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; Chicago &c. R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206 and note; Gulf &c. Co. v. Wells, 81 Tex. 685, 17 S. W. 511. See generally Texas Central R. Co. v. Lyons (Tex. Civ. App.), 34 S. W. 362; Cleveland &c. R. Co. v. Selsor, 55 Ill. App. 685; Krampe v. St. Louis &c. Asso., 59 Mo. App. 277; Moore v. Southern R. Co., 141 N. Car. 111, 53 S. E. 745; note to Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. 281, 291, et seq. Scores of additional authorities could be cited in support of this elementary proposition. As to proper phrasing of the rule, see note to Armour Co. v. Russell, 144 Fed. 614, in 6 L. R. A. (N. S.) 602, where numerous cases are cited.

[75] Flowers v. Louisville &c. R. Co., 55 Fla. 603, 46 So. 718; Louisville &c. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108 and authorities cited; Atchison &c. R. Co. v. Napole, 55 Kans. 401, 40 Pac. 669; Atchison &c. R. Co. v. Winston, 56 Kans. 456, 43 Pac. 777; McDonnell v. New York &c. R. Co., 192 Mass. 538, 78 N. E. 548, 7 Ann. Cas. 690; McCabe v. Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; Titus v. Railroad Co., 136 Pa. St. 618, 20 Am. St. 944, 20 Atl. 517; Galveston &c. R. Co. v. Gormley (Tex.), 27 S. W. 1051, note in 6 L. R. A. (N. S.) 602; Texas &c. R. Co. v. Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674. The company does not owe a duty to furnish absolutely safe coal. Vissman v. Southern Ry. Co., 28 Ky. L. 429, 89 S. W. 502.

[76] Northern Pacific R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. ed. 296; Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. ed. 235; Union Pac. R. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. ed. 464; Texas &c. Co. v. Thompson, 70 Fed. 944. See also Friel v. Citizens' R. Co., 115 Mo. 503, 22 S. W. 498; Harris v. Kansas City &c. R. Co., 146 Mo. App. 524, 124 S. W. 576; Jones v. New York &c. R. Co., 22 Hun (N. Y.) 284.

But it is error to assert that the highest degree of care is required,[77] for the standard is ordinary care, although in order to determine what constitutes ordinary care in the particular instance, the dangers of the service must be considered. What would be ordinary care under some circumstances might not be ordinary care under other circumstances.[78]

§ 1832 (1274). Appliances generally used sufficient. — The general rule is that if the employer uses ordinary care to provide and to keep in reasonably safe condition, appliances of a kind that are in common use for the purpose, he is not guilty of negligence.[79] If he conforms to the ordinary usages of business

[77] Texas Central R. Co. v. Lyons (Tex. Civ. App.), 34 S. W. 362; Gulf &c. R. Co. v. Wells, 81 Tex. 685, 17 S. W. 511; International &c. R. Co. v. Williams, 82 Tex. 342, 18 S. W. 700; East Tenn. &c. R. Co. v. Aiken, 89 Tenn. 245, 45 S. W. 1082; Allen v. Union Pac. R. Co., 7 Utah 239, 26 Pac. 297.

[78] Wabash R. Co. v. Ray, 152 Ind. 392, 399, 51 N. E. 920, 922 (citing text). See also Houston &c. R. Co. v. Patrick, 50 Tex. Civ. App. 491, 109 S. W. 1097. In a recent case where the handhold on the manhole of an engine tender, while primarily used to raise the manhole cover, was also commonly used, without objection from the railroad, by brakemen and others as the most convenient and the safest way to assist them in getting on and off the tender, it was held that the railroad company is bound to exercise ordinary care to see that such handhold is in a reasonably safe condition for the use to which the brakemen and other employes put it. Wood v. Southern R. Co., 104 Va. 650, 52 S. E. 371. As to evidence necessary to show defective handhold and negligence in regard to inspection; see Baltimore &c. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108, L. R. A. 1918 F, 1205. See also Coates v. Boston &c. R. Co., 153 Mass. 297, 26 N. E. 864, 10 L. R. A. 769; McIntyre v. Boston &c. R. Co., 163 Mass. 189, 39 N. E. 1012. But, ordinarily, the master is not obliged to make safe for one purpose an appliance intended for another and the employe assumes the risk of using it for his own convenience. Williams v. Alabama &c. Ry. Co., 15 Ga. App. 652, 84 S. E. 149. See also Chicago &c. R. Co. v. Hamilton, 42 Ind. App. 512, 85 N. E. 1044; Conroy v. Morrill &c. Co., 194 Mass. 476, 80 N. E. 489.

[79] Maharjah, The, 40 Fed. 784; Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. ed. 235; Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; Dean v. Central City &c. Co. (Ky. App.), 125 S. W. 739, 27 L. R. A. (N. S.) 181 and note; Myers v. Hudson Iron Co., 150 Mass. 125,

and procures such appliances and machinery as are in common use, and exercises reasonable care to keep them in a reasonably safe condition, he is not ordinarily guilty of negligence, and if not guilty of negligence an injured employe has no right of action against him.[80] The test of liability on the part of the employer is negligence. If there is no negligence there is no liability, and the rule is that where the employer does what is commonly and generally done by persons or corporations engaged in the same general line of business, he is not, ordinarily at least, guilty of actionable negligence.[81] But it is held in

22 N. E. 631, 15 Am. St. 176; Carey v. Boston &c. R. Co., 158 Mass. 228, 33 N. E. 512; McCarthy v. Boston &c. Co., 165 Mass. 165, 42 N. E. 568; Michigan &c. R. Co. v. Coleman, 28 Mich. 440; Lafflin v. Buffalo &c. R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; Harley v. Buffalo &c. Co., 142 N. Y. 31, 36 N. E. 813; Allison &c. Co. v. McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. 613; Lehigh &c. Co. v. Hayes, 128 Pa. St. 294, 18 Atl. 387, 5 L. R. A. 441, 15 Am. St. 680; Whitwam v. Wisconsin &c. R. Co., 58 Wis. 408, 17 N. W. 124. See generally East St. Louis Provision Co. v. Hightower, 92 Ill. 139; St. Louis &c. R. Co. v. Needham, 69 Fed. 823; Port Royal &c. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833. See also notes in 65 Am. St. 738, and in 98 Am. St. 295, in 16 L. R. A. (N. S.) 128 and 7 L. R. A. (N. S.) 181; White's Supp. to Thomp. Neg. § 3993. But see Martin v. California &c. Ry. Co., 94 Cal. 326, 29 Pac. 645; Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679; Wilson v. New York &c. R. Co., 29 R. I. 146, 69 Atl. 364, 15 L. R. A. (N. S.) 523 n, 17 Ann. Cas. 50.

[80] Texas &c. R. Co. v. Rhodes, 71 Fed. 145; Georgia &c. R. Co. v. Nelms, 83 Ga. 70, 20 Am. St. 308; Pennsylvania Co. v. Congdon, 134 Ind. 226, 39 Am. St. 251; Doyle v. White &c. Co., 35 N. Y. S. 760; Titus v. Bradford &c. R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. 944; Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 510, 13 L. R. A. 374 and note, 27 Am. St. 633; Smith v. Old Colony &c. R. Co., 10 R. I. 22. See generally Dougan v. Champlain Transportation Co., 56 N. Y. 1; Loftus v. Union &c. Co., 84 N. Y. 455, 38 Am. Rep. 533 and note; Burke v. Wetherbee, 98 N. Y. 562; La Pierre v. Chicago &c. R. Co., 99 Mich. 212, 58 N. W. 60; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388; Carr v. St. Clair Tunnel Co., 131 Mich. 592, 92 N. W. 110, 111 (citing text and applying this rule to the making of a "flying switch"). See also Turner v. Detroit &c. R. Co., 139 Mich. 142, 100 N. W. 268; Weed v. Chicago &c. R. Co., 5 Nebr. 623, 99 N. W. 827; Bjornsen v. Northern Pac. Ry. Co., 84 Wash. 220, 146 Pac. 575.

[81] Louisville &c. R. Co. v. Allen, 78 Ala. 494; Jones v. Malvern &c. Co., 58 Ark. 125, 23 S. W. 679; Grand Rapids &c. R. Co. v. Hunt-

many cases that the fact that the appliance is in general use is not always conclusive.[82]

§ 1833 (1275). Latent defects.—The general rule is that an employer is not liable to an employe for injury caused by latent defects in appliances or machinery.[83] It is not to be understood,

ley, 38 Mich. 537, 31 Am. Rep. 321; Allison &c. Co. v. McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. 613; Delaware &c. Co. v. Nuttall, 119 Pa. St. 149, 13 Atl. 65; Reese v. Hershey, 163 Pa. St. 253, 29 Atl. 707, 43 Am. St. 795; Vinton v. Schaub, 32 Vt. 612; Bertha &c. Co. v. Martin, 93 Va. 791, 22 S. E. 869. See Georgia &c. Co. v. Propst, 83 Ala. 518, 3 So. 764; Richmond &c. R. Co. v. Jones, 92 Ala. 218, 9 So. 276. In Choctaw &c. R. Co. v. Stroble, 80 Ark. 68, 96 S. W. 116, it is held that "whether it was negligence for a railroad company to furnish employes a hand car with a defective brake with which to haul ties a short distance along the track is a question for the jury; there being testimony that it was customary in doing such work to use push cars without brakes or other appliances for stopping them or checking their speed, and that a load of ties would be so high that, if there was a brake, it could not be reached by the men pushing it along." And in McDonnell v. New York &c. R. Co., 192 Mass. 538, 78 N. E. 548, 7 Ann. Cas. 690, it is held that a railroad company is not bound as a matter of law to furnish a stationary ladder or one with hooks for the use of a fireman in climbing to the top of its engines, but is only bound to exercise reasonable care to see that the ladders furnished are safe and proper for the use for which they are intended. A custom or practice may be negligent and inexcusable. Hosic v. Chicago &c. Ry. Co., 75 Iowa 683, 9 Am. St. 518, 37 N. W. 963; Allen v. Burlington &c. R. Co., 64 Iowa 94, 19 N. W. 870.

[82] Wiita v. Interstate Iron Co., 103 Minn. 303, 115 N. W. 169, 16 L. R. A. (N. S.) 128, 14 Ann. Cas. 225; and cases then cited in opinion and note. Cases on both sides are cited in the note referred to, and it appears that a large majority of them hold that, ordinarily at least, there is no negligence if the appliance is such as is in common and general use for the purpose.

[83] Shankweiler v. Boston &c. R. Co., 148 Fed. 195; Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574; Reid v. Central &c. R. Co., 81 Ga. 694; Chestnut v. Southern Ind. Ry. Co., 157 Ind. 509, 62 N. E. 32; Newcastle Bridge Co. v. Steele, 38 Ind. App. 194, 78 N. E. 208; Dunlap v. Indiana Un. Trac. Co., 45 Ind. App. 347, 90 N. E. 904; Atchison &c. R. Co. v. Wagner, 33 Kans. 660, 7 Pac. 204; Louisville &c. R. Co. v. Hinder, 19 Ky. L. 840, 30 S. W. 399; Mackin v. Boston &c. R. Co., 135 Mass. 201, 46 Am. Rep. 456, 15 Am. & Eng. R Cas. 196; Rooney v. Boston &c. R Co., 208 Mass. 106, 94 N. E. 288;

however, that the employer is not under a duty to exercise ordinary care in causing reasonably careful and proper inspections to be made. If the defect is one which an ordinarily careful inspection would reveal it cannot be regarded as a latent defect within the rule which exonerates the master from liability in cases of injuries attributable to latent defects,[84] but a defect which reasonably careful inspection will not reveal is a latent defect within the rule.[85]

§ 1834 (1276). **Delegation of master's duty.**—The modern decisions affirm that a master cannot escape liability by delegating the duty owing employes.[86] There is now little doubt as to the

Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Fay v. Minneapolis &c. R. Co., 30 Minn. 231, 15 N. W. 241, 11 Am. & Eng. R. Cas. 193; Mercer v. Atlantic &c. R. Co., 154 N. Car. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002; Moore v. Pennsylvania Co., 167 Pa. St. 495, 31 Atl. 734; Galveston &c. R. Co. v. Buch, 27 Tex. Civ. App. 283, 65 S. W. 681.

[84] Dobbin v. Richmond &c. R. Co., 81 N. Car. 446, 31 Am. Rep. 512. See also Illinois Steel Co. v. Loughran, 136 Ill. App. 432; Mitchell Lime Co. v. Nickless, 44 Ind. App. 197, 85 N. E. 728; Osborn v. Nelson, 141 Mo. App. 428, 126 S. W. 178; Burnes v. Kansas City &c. R. Co., 129 Mo. 41, 31 S. W. 347; Carroll v. Tidewater Oil Co., 67 N. J. L. 679, 52 Atl. 275.

[85] Chicago &c. R. Co. v. Hagar, 11 Ill. App. 498; Philadelphia R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286, 33 Am. & Eng. R. Cas. 348. See also Texas &c. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; Shankweiler v. Baltimore &c. R. Co., 148 Fed. 195; Alves v. New York &c. R. Co., 27 R. I. 581, 65 Atl. 261; Missouri &c. R. Co. v. Crenshaw, 71 Tex. 341, 9 S. W. 262.

[86] Hough v. Railroad Co., 100 U. S. 213, 25 L. ed. 612; Baltimore & R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Gardner v. Michigan Central R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; Union Pac. R. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Northern &c. R. Co. v. Charless, 51 Fed. 562; Northern Ala. R. Co. v. Mansell, 138 Ala. 548, 36 So. 459; Mullin v. California &c. R. Co., 105 Cal. 77, 38 Pac. 535; Chicago &c. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 454, 43 Am. St. 259; Indiana &c. R. Co. v. Parker, 100 Ind. 181 and cases cited; Indiana &c. R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Indiana Un. Trac. Co. v. Long, 176 Ind. 532, 96 N. E. 604; Patterson v. Southern R. Co., 52 Ind. App. 618, 99 N. E. 491; Hannibal &c. R. Co. v. Fox, 31 Kans. 587, 3 Pac. 320, 15 Am. & Eng. R. Cas. 325; Spicer v. South Boston Iron Co, 138

general rule, but there is doubt as to what constitutes the master's duty. We have heretofore shown what the duty of the master is, and we shall now consider duties that are not those of the master. There are duties which may be delegated, and where duties are rightfully delegated the fellow-servant rule applies except where otherwise provided by statute. It may be safely said that if the duty is one that may be delegated the master is not responsible at common law for the negligence of the person to whom the duty is assigned. In other words the right to assign or delegate a duty conclusively implies that the duty is not that of the master in such a sense as to render him responsible for negligence in its performance. There are, it is obvious, many duties which may be intrusted to subordinate employes, and where such a duty is performed by a subordinate employe, generally called a servant, the common master is not liable to the co-employes or fellow servants for the negligence of the servant by whom the duty is performed, unless made so by statute. Duties incident to the running of trains are, as a rule, duties that may be delegated. Thus the duty of opening and closing switches is a duty that may be delegated, as it is not in a just sense the duty of the master.[87] The fact that a

Mass. 426; Rogers v. Ludlow Manufacturing Co., 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68 and note; Morton v. Detroit &c. R. Co., 81 Mich. 423, 46 N. W. 111; McLean v. Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748; Brown v. Minneapolis &c. R. Co., 31 Minn. 553, 18 N. W. 834; Flike v. Boston &c. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Hankins v. New York &c. R. Co., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. 616, 25 L. R. A. 396; Gunter v. Graniteville &c. R. Co., 18 S. Car. 262, 44 Am. Rep. 573; Bowers v. Union &c. R. Co., 4 Utah 215; Moon v. Richmond &c. R. Co., 78 Va. 745, 17 Am. & Eng. R. Cas. 531; Criswell v. Pittsburg &c. R. Co., 30 W. Va. 798, 6 S. E. 31, 33 Am. & Eng. R. Cas. 232. See also notes in 26 L. R. A. (N. S.) 624, 639; 30 L. R. A. (N. S.) 50. Not even to an independent contractor: Toledo Brewing &c. Co. v. Bosch, 101 Fed. 530; Vickers v. Kanawha &c. R. Co., 64 W. Va. 474, 63 S. E. 367, 20 L. R. A. (N. S.) 793 n, 131 Am. St. 929, Ann. Cas. 1917D, 453 and note; where other authorities are cited to same effect.

[87] Chicago &c. R. Co. v. Barker, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375; St. Louis &c. R. Co. v. Needham, 63 Fed. 107, 25 L. R. A. 833. The

rule of the company leaves to a conductor a discretion as to the manner in which a train in his charge may be moved over the summit of a heavy grade does not make him a vice-principal, nor is the duty of moving the train that of the company in such a sense that it cannot be delegated.[88] So, the duty to use reasonable care to supply and maintain safe appliances does not so extend to their use that it can never be delegated, and it is said that it "is not extended to all the passing risks which arise from short-lived causes." [89]

§ 1835 (1277). Employer not bound to abandon appliances because newer ones are in use.—An employer is not bound to abandon the use of machinery or appliances merely because newer and perhaps better ones come into use. If the appliances are in common use and in good repair the employer is not ordinarily to be deemed negligent because he does not cast them aside and procure newer ones. If there is no negligence on the employer's part there can be no actionable wrong simply because the appliances are not replaced by better and safer ones, although it is within the power of the employer to procure

case cited holds that brakemen and switchmen are fellow servants. The following cases were cited, Randall v. Baltimore &c. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; Quebec Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. ed. 656; Northern Pacific R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728, 17 L. R. A. 190; Chicago &c. R. Co. v. Henry, 7 Ill. App. 322; Slattery v. Toledo &c. R. Co., 23 Ind. 81; Walker v. Boston &c. R. Co., 128 Mass. 8; Roberts v. Chicago &c. R. Co., 33 Minn. 218, 22 N. W. 389; Harvey v. New York &c. R. Co., 88 N. Y. 481, 484; Miller v. Southern Pacific R. Co., 20 Ore. 285, 26 Pac. 70. See also note in 17 L. R. A. (N. S.) 542.

[88] Wooden v. Western &c. Co., 147 N. Y. 508, 42 N. E. 199.

[89] Whittaker v. Bent, 167 Mass. 588, 46 N. E. 121, quoted in Northern Pac. R. Co. v. Dixon, 194 U. S. 346, 24 Sup. Ct. 686, 48 L. ed. 1006; also in Baltimore &c. R. Co. v. Brown, 146 Fed. 24, 29. See also Portland &c. Min. Co. v. Duke, 164 Fed. 180; Barker v. Chicago &c. Ry. Co., 51 Ind. App. 669, 99 N. E. 135; Indianapolis & Trac. Co. v. Matthews, 177 Ind. 88, 97 N. E. 320; Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202.

them.[90] But it is held that railroad companies should keep reasonably abreast with the times.[91]

§ 1836 (1278). **Inspection—Duty of.**—It is the duty of the employer to exercise reasonable care and diligence in inspecting appliances which the employe is required to use in the performance of the duties of his service.[92] The duty to inspect is, however, owing only to an employe whose duty requires him to use the appliances, for there is no such duty owing to one who voluntarily goes outside of the duties required of him by

[90] Southern Pac. R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 535, 38 L. ed. 391; Chicago &c. R. Co. v. Linney, 59 Fed. 45; Homestake &c. Co. v. Fullerton, 69 Fed. 923, 929; Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440; Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154; Sullivan v. India &c. R. Co., 113 Mass. 396; Hodgkins v. Eastern R. Co., 119 Mass. 419; Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Burgess v. Humphrey Bookcase Co., 156 Mich. 345, 120 N. W. 790; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Sweeney v. Berlin &c. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722, and note; Walsh v. Whiteley, L. R. 21 Q. B. Div. 371. See also Bailey v. Meadows Co., 154 N. Car. 71, 69 S. E. 746; Nutt v. Southern Pac. R. Co., 25 Ore. 291, 35 Pac. 653, 654; Norfolk &c. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700; Watts v. Hart, 7 Wash. 178, 34 Pac. 423; Buttner v. South Baltimore &c. Co., 101 Md. 168, 60 Atl. 597, note in 65 Am. St. 740.

[91] Richmond &c. R. Co. v. Jones, 92 Ala. 218, 9 So. 278; Tennessee &c. R. Co. v. Kyle, 93 Ala. 1, 8 So. 764, 12 L. R. A. 103; Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679; Greenlee v. Southern R. Co., 122 N. Car. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. 734; Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; Norfolk &c. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700.

[92] Northern Pacific & R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. ed. 755; Erie R. Co. v. Schomer, 171 Fed. 798; Little Rock &c. R. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. 230; Indiana &c. R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Brann v. Chicago &c. R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243; Atchison &c. R. Co. v. Wagner, 33 Kans. 660, 7 Pac. 204; Siela v. Hannibal &c. R. Co., 82 Mo. 430; Johnson v. Missouri Pacific R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. 351; Nicholds v. Chrystal &c. R. Co., 126 Mo. 55, 28 S. W. 991; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; McConnell v. Pennsylvania R. Co., 223 Pa. St. 442, 72 Atl. 849; Galveston &c. R. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066; St. Louis &c. R. Co. v. Keith, 58 Tex. Civ. App. 323, 124 S. W. 695; McKenzie v. North Coast &c. Co., 55 Wash. 495, 104 Pac. 801, 28 L. R.

the contract of employment and makes use of appliances in another department or intended for use by a different class of employes.[93] There is, it is to be kept in mind, no absolute duty to furnish safe appliances or to keep them in safe condition for use, but there is a duty to exercise reasonable care in that regard.[94] Reasonable care requires that inspections should be made at reasonable intervals of time and that ordinary care should be exercised to secure qualified and competent inspectors.[95] The employer is only required to make reasonable and

A. (N. S.) 1244; Wedgwood v. Chicago &c. R. Co., 41 Wis. 478, 44 Wis. 44; Bessex v. Railway Co., 45 Wis. 482; Paine v. Eastern R. Co., 91 Wis. 340, 64 N. W. 1005; note to Gulf &c. R. Co. v. Larkin, 98 Tex. 225, 1 L. R. A. (N. S.) 944. There are no rigid rules applicable to the care to be exercised in making inspections except that the care exercised must be ordinary or reasonable. If the process of inspection is that commonly employed, or if it is reasonably adapted to the kinds of appliance requiring inspection, it is usually sufficient. Allen v. Union &c. R. Co., 7 Utah 239, 26 Pac. 297. See also Chicago &c. R. Co. v. Wilfong (Ind. App.), 88 N. E. 953; Baltimore &c. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108, L. R. A. 1918F, 1205, (inspection of handhold by merely looking at it in passing, without any actual test, insufficient); Ware v. Ithaca St. R. Co., 125 App. Div. 323, 109 N. Y. S. 426.

[93] Alabama &c. R. Co. v. Hall, 105 Ala. 599, 17 So. 176; Central &c. R. Co. v. Chapman, 96 Ga. 769, 22 S. E. 273; Preston v. Chicago &c. R. Co., 98 Mich. 128, 57 N. W. 31; Illinois Cent. R. Co. v. Daniels, 73 Miss. 258, 19 So. 830; Millar v. Madison &c. R. Co., 130 Mo. 517, 31 S. W. 574; Young v. Boston &c. R. Co., 69 N. H. 356, 41 Atl. 268; Kiernan v. Gutta Percha &c. Co., 134 App. Div. 192, 118 N. Y. S. 893. See also McGrony v. Ultima Thule &c. R. Co., 90 Ark. 210, 118 S. W. 710, 134 Am. St. 24, 23 L. R. A. (N. S.) 301 and notes; East St. Louis &c. R. Co. v. Craven, 52 Ill. App. 415; Jayne v. Sebewaing Co., 108 Mich. 242, 65 N. W. 971.

[94] Texas &c. R. Co. v. Rhodes, 71 Fed. 145; Nord Deutscher &c. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. 604; Ohio &c. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Hill v. Southern Pac. Co., 23 Utah 94, 63 Pac. 814; Atchison &c. R. Co. v. Napole, 55 Kans. 401, 40 Pac. 669.

[95] Gibson v. Northern &c. R. Co., 22 Hun (N. Y.), 289; Northern Pac. R. Co. v. Altimus, 179 Fed. 275. See as to whether employment of competent inspector is sufficient. Young v. Mason Stable Co., 193 N. Y. 188, 86 N. E. 15, 127 Am. St. 939, 21 L. R. A. (N. S.) 592, and cases there cited in notes. It is not necessary that the inspection be continuous, for it is sufficient if it be made at reasonable

practicable inspections and is not required to tear appliances or machinery into pieces.[96] If the tests in common use are applied with reasonable care and skill the employer is not guilty of an actionable breach of the duty of inspection.[97] The duty to inspect is a continuing one, that is, it requires inspections to be made, with ordinary care and in the mode commonly adopted,

intervals. Krampe v. St. Louis &c. R. Co., 59 Mo. App. 277; Grand Rapids &c. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Ketterman v. Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683, 689 (citing text). But where there has been an unusual strain or the like an inspection at the time or before using again may be required. Norfolk &c. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367. See also St. Louis &c. R. Co. v. George, 85 Tex. 150, 19 S. W. 1036.

[96] Richmond &c. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. ed. 728; Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; Indianapolis &c. R. Co. v. Toy, 91 Ill. 474, 33 Am. Rep. 57; Smith v. Chicago &c. R. Co., 42 Wis. 520. See also Chicago &c. R. Co. v. Wilfong (Ind. App.), 88 N. E. 953; Donaldson v. Brooklyn Heights R. Co., 129 App. Div. 433, 114 N. Y. S. 11. In Hoover v. Chicago &c. R. Co., 40 Tex. Civ. App. 280, 89 S. W. 1084, it is held that the fact that a railroad company tested but one wheel out of every fifty purchased does not show negligence with respect to an injured servant, in the absence of proof that other or further test was necessary or usual, or that the customary test was not applied to the wheel which caused the injury; that evidence that the inspection was the same in kind and character as that in use by railroads generally, and that the inspector, who was unusually competent and experienced, knew when he made the inspection that his son was to go out on the engine or tender in question, was relevant. See also Royce v. Delaware &c. R. Co., 180 Fed. 879. See also to the effect that such an inspection as will seriously embarrass the master's work is not required. Smoot v. Mobile &c. R. Co., 67 Ala. 13; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286. But where an old locomotive exploded after having just been in the shop for repair it was held that it should have been subjected to the hydraulic test. National Ry. v. Sigarde (Tex. Civ. App.), 172 S. W. 1140.

[97] Texas &c. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; Shandrew v. Chicago &c. R. Co., 142 Fed. 320; Jones v. Malvern &c. R. Co., 58 Ark. 125, 23 S. W. 679; Morton v. Detroit &c. R. Co., 81 Mich. 423, 46 N. W. 111; Perry v. Michigan Central &c. R. Co., 108 Mich. 130, 65 N. W. 608; Fenderson v. Atlantic &c. R. Co., 56 N. J. L. 708, 31 Atl. 767; Racine v. New York &c. R. Co., 70 Hun 453, 24 N. Y. 388; Manser v. Eastern Counties R. Co., 3 L. T. R. (N. S.) 585; Murphy v. Phillips, 35 L. T. R. (N. S.) 477.

at reasonable intervals, since an employer is chargeable with notice of the liability of machinery and appliances to become weakened by age and decay.[98] The duty of inspection imposed on the employer extends to and includes working places,[99] cars,[1] loco-

[98] St. Louis &c. Ry. Co. v. Brown, 67 Ark. 295, 54 S. W. 865, 869 (citing text); Indianapolis v. Scott, 72 Ind. 196; Board of Comrs. v. Bacon, 96 Ind. 31; Indiana Car. Co. v. Parker, 100 Ind. 181, 193; Wabash &c. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661; Ryan v. Fall River &c. Co., 200 Mass. 188, 86 N. E. 310; Rapho Tp. v. Moore, 68 Pa. St. 404, 8 Am. Rep. 202. See generally as to the duty of inspection, De Graff v. New York &c. R. Co., 76 N. Y. 125; Ft. Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Carlson v. Phenix Bridge Co., 132 N. Y. 273, 30 N. E. 750; Louisville &c. R. Co. v. Berry, 2 Ind. App. 427; Randolph v. New York Cent. &c. R. Co., 69 N. J. 420, 55 Atl. 240 (only practicable, reasonable test and not laboratory test required).

[99] Ohio &c. R. Co. v. Heaton, 137 Ind. 1, 35 N. E. 687, 19 L. R. A. 365, 33 Am. St. 690; Linton &c. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214.

[1] Sheedy v. Chicago &c. R. Co., 55 Minn. 357, 57 N. W. 60; Union &c. R. Co. v. Snyder, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Brann v. Chicago &c. R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243. See Evans v. Chamberlain, 40 S. Car. 104, 18 S. E. 213; Texas &c. R. Co. v. Barrett, 67 Fed. 214; Settle v. St. Louis &c. R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. 633; Rodney v. St. Louis &c. R. Co., 127 Mo. 676, 30 S. W. 150; Bailey v. Rome &c. R. Co., 139 N. Y. 302, 34 N. E. 918; Beard v. Chesapeake &c. R. Co., 90 Va. 351, 18 S. E. 559. See also Smith v. Thomson-Houston Elec. Co., 188 Mass. 371, 74 N. E. 664; Crawford v. United R. &c. Co., 101 Md. 402, 61 Atl. 287, 70 L. R. A. 489. In St. Louis &c. R. Co. v. Johnson, 74 Kans. 83, 86 Pac. 156, 159, it is said: "The defect was an obvious one which the most casual inspection would have disclosed. The jury therefore rightfully inferred that the car was put into the train without inspection. Missouri Pacific R. Co. v. Barber, 44 Kans. 612, 24 Pac. 969. The railroad company was charged in the petition with negligence in not having the car inspected, and in putting it into the train for the employes to use in its dangerous and defective condition. Its duty required it to use the reasonable diligence to provide the employes with reasonably safe appliances for the performance of their duties. Atchison &c. R. Co. v. Penfold, 57 Kans. 148, 45 Pac. 574; Missouri Pacific R. Co. v. Dwyer, 36 Kans. 58, 12 Pac. 352. The doctrine of assumed risks has no application. In the absence of notice deceased had the right to assume that the car and the appliances were reasonably safe. Missouri Pacific R. Co. v. Barber, 44 Kans. 612, 24 Pac. 969; Atchison &c. R. Co. v. Seeley, 54 Kans. 21,

motives,[2] and all appliances which ordinary care requires should be examined.[3] It is true that some appliances may require inspection oftener than others, but the courts cannot lay down specific rules for determining how frequently inspections should be made. The rule for determining the frequency of inspections is that they must be made as often as ordinary care requires, but what is ordinary care in one class of cases may not be ordinary care in other classes. Conformity to common usage or custom will usually be ordinary care in regard to the frequency of inspections as it generally is in regard to other matters concerning the employer's duty.[4]

37 Pac. 104; Atchison R. Co. v. Penfold, 57 Kans. 148, 45 Pac. 574; Southern Kansas R. Co. v. Michaels, 57 Kans. 474, 46 Pac. 938; Atchison R. Co. v. Bancord, 66 Kans. 81, 71 Pac. 253. It has been repeatedly declared to be the duty of the railroad company to inspect its cars before putting them in the service. Solomon R. Co. v. Jones, 30 Kans. 601, 2 Pac. 657; St. Louis &c. R. Co. v. Weaver, 35 Kans. 412, 11 Pac. 408, 57 Am. Rep. 176; Atchison &c. R. Co. v. Napole, 55 Kans. 401, 40 Pac. 669; Atchison &c. R. Co. v. Wagner, 33 Kans. 661, 7 Pac. 204."

[2] Southern &c. R. Co. v. Lafferty, 57 Fed. 536; Finley v. Richmond &c. R. Co., 59 Fed. 419; Tennessee &c. R. Co. v. Kyle, 93 Ala. 1, 8 So. 764, 12 L. R. A. 103; Gibson v. Minneapolis &c. R. Co., 55 Minn. 177, 56 N. W. 686, 43 Am. St. 482; Fry v. Great Northern R. Co., 95 Minn. 87, 103 N. W. 733; O'Mellia v. Kansas City &c. R. Co., 115 Mo. 205, 21 S. W. 503; Coontz v. Missouri &c. R. Co., 121 Mo. 652, 26 S. W. 661, 59 Am. & Eng. R. Cas. 169; Ryan v. New York &c. R. Co., 88 Hun 269, 34 N. Y. S. 665.

[3] Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574; Kansas City &c. R. Co. v. Ryan, 52 Kans. 637, 35 Pac. 292, 59 Am. & Eng. R. Cas. 136; Lake Erie &c. R. Co. v. McHenry, 10 Ind. App. 525, 37 N. E. 186; Louisville &c. R. Co. v. Hinder, 16 Ky. L. 841, 30 S. W. 399. We have not attempted to cite all the cases upon the topics referred to in the text, for the cases are much too numerous for citation.

[4] Louisville &c. R. Co. v. Jones, 83 Ala. 376, 30 So. 902, 34 Am. & Eng. R. Cas. 417; Georgia &c. R. Co. v. Propst, 83 Ala. 518, 3 So. 764; Alabama &c. R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. 354; Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84, 39 Am. & Eng. R. Cas. 298; Holland v. Tenn. &c. R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232; Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574; Galveston &c. R. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 1019. But see Missouri &c. R. Co.

§ 1837 (1278a). Simple tools.—There are some cases in which, where the employe has the custody and care of the tool himself or makes his own selection of an unfit tool from a number of proper tools the master is not liable[5] as he might otherwise be. And this doctrine has often been applied and even extended in the case of so-called simple tools. Many authorities are cited and the rule is thus stated in a recent case:[6] "When the appliances or machinery furnished employes are at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects. But the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments."[7] But,

v. Dwyer, 36 Kans. 58, 12 Pac. 352; International &c. R. Co. v. Hawes (Tex. Civ. App.), 54 S. W. 325.

[5] See Hefferen v. Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1 (distinguished in Morris v. Eastern R. Co., 88 Minn. 112, 92 N. W. 535); Green v. Sansom, 41 Fla. 94, 35 So. 332; Toledo &c. R. Co. v. Eddy, 72 Ill. 138; Chicago &c. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688; Peoria &c. R. Co. v. Hardwick, 48 Ill. App. 562; Merganthaler &c. Co. v. Taylor, 28 Ky. L. 923, 90 S. W. 968; Dernfier v. Lewis, 131 Mich. 144, 91 N. W. 152; Rawley v. Collian, 90 Mich. 31, 51 N. W. 350; Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952. See also Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. ed. 281; Lee v. Atlantic &c. R. Co., 125 Ga. 655, 54 S. E. 678; Sapp v. Christie Bros., 79 Nebr. 701, 113 N. W. 189; Holt v. Chicago &c. R. Co., 94 Wis. 596, 69 N. W. 352; White's Supp. to Thomp. Corp. § 5376.

[6] Koschman v. Ash, 98 Minn. 312, 108 N. W. 514, 515, 116 Am. St. 373, where the rule was applied to a common hammer or sledge.

[7] Citing Miller v. Erie R. Co., 21 App. Div. 45, 47 N. Y. S. 285 (a push-pole by which an engine on one track was able to move a car on an adjoining track); Georgia &c. R. Co. v. Brooks, 84 Ala. 138, 4 So. 289; Georgia R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. 308; Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936 (a hammer); Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Meador v. Lake Shore &c. R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. 384 (a ladder); Lynn v. Sugar Ref. Co., 128 Iowa 501, 104 N. W. 577 (a hammer of soft steel with which to break lumps of coal); Garragan v. Iron Works, 158 Mass. 596, 33 N. E. 652; Wachsmuth v. Electric Crane Co., 118 Mich. 275, 76 N. W. 497 (a snaphammer); Dompier v. Lewis, 131 Mich. 144, 91 N. W. 152 (a hammer); Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56 (a ladder); Cahill v. Hilton, 106

where the defect is not obvious and the master keeps and controls the tool, without any opportunity on the part of the employe to select or examine it, and has assumed to inspect and keep it in repair, we think that this doctrine is not fairly applicable, at least where the defect is not caused while the employe is using the tool.[8] In some cases, however, the company has

N. Y. 512, 518, 13 N. E. 339 (a ladder); Martin v. Highland Co., 128 N. Car. 264, 38 S. E. 876, 83 Am. St. 671; Railway Co. v. Larkin, 98 Tex. 225, 82 S. W. 1026 (a defective globe on a lantern); O'Brien v. Railway Co., 36 Tex. Civ. App. 528, 82 S. W. 319 (a wrench). See also Nichols v. Pere Marquette R. Co., 145 Mich. 643, 108 N. W. 1016 (ladder); Ludovski v. Michigan Cent. R. Co., 164 Mich. 361, 129 N. W. 707; Kromer v. Minneapolis &c. R. Co., 39 Minn. 424, 166 N. W. 1072 (wrench); Dessecker v. Phoenix Mills Co., 98 Minn. 439, 108 N. W. 516; Masich v. American Smelting Co., 44 Mont. 36, 118 Pac. 764, Ann. Cas. 1912D, 984 (pine stick); Mercer v. Atlantic Coast Line R. Co., 154 N. Car. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002, and note; also note to Myer v. Ladewig, 130 Wis. 566, 115 N. W. 419, in 13 L. R. A. (N. S.) 684; and note in 30 L. R. A. (N. S.) 800. In such cases it is thought that the employe who uses the tool has a better opportunity to discover the defect or judge of the sufficiency of the tool than the master. A handcar is not a simple tool within the rule. St. Louis &c. R. Co. v. Ewing (Tex. Civ. App.), 180 S. W. 300. The Supreme Court of Wisconsin has held that a maul is a simple tool, Kolosinski v. Chicago &c. R. Co., 164 Wis. 50, 159 N. W. 563, but that furnishing an employe with a stepladder is furnishing him a place whereon to stand and that it is a place or appliance and not a tool. Puza v. C. Hennecke Co., 158 Wis. 482, 149 N. W. 223.

[8] See Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854; Baltimore &c. R. Co. v. Walker, 41 Ind. App. 588, 84 N. E. 730; Vant Hull v. Great Northern R. Co., 90 Minn. 329, 96 N. W. 789; Guthrie v. Louisville &c. Co., 11 Lea (Tenn.) 372, 47 Am. Rep. 286; Texas &c. R. Co. v. Frijerina, 51 Tex. Civ. App. 100, 111 S. W. 239; Panhandle &c. R. Co. v. Fitts (Tex. Civ. App.), 188 S. W. 528; Stork v. Charles &c. Cooperage Co., 127 Wis. 318, 106 N. W. 841. See also Deckerd v. Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982; Cooper v. Penn Bridge Co., 47 App. D. C. 467, L. R. A. 1918D, 1138 and note; Williams v. Garbutt Lumber Co., 132 Ga. 221, 64 S. E. 65; Republic Iron &c. Co. v. Ohler, 161 Ind. 393, 68 N. E. 901; Standard Oil Co. v. Fordeck, 34 Ind. App. 181, 71 N. E. 163; Ohio Val. R. Co. v. Copley, 159 Ky. 38, 116 S. W. 625; Cincinnati &c. Ry. Co. v. Quinn, 163 Ky. 157, 173 S. W. 358; Nichols v. Pere Marquette R. Co., 145 Mich. 643, 108 N. W. 1016; Drake v. San Antonio &c. R. Co., 99 Tex. 240, 89 S. W. 407. For

also been held free from liability on the ground that the injury from a sliver flying from a hammer, or the like, was a pure accident.[9]

§ 1838 (1279). **Foreign cars—Duty of inspection.**—There is wide diversity of opinion as to the duty of a railroad company to inspect cars received from other companies. Courts of high standing hold that there is a duty to inspect foreign cars, and that danger from such cars is not an ordinary risk of the service assumed by the employe.[10] In other cases the ruling is that the company receiving a foreign car is not under a duty to

other cases in which the employer was held not liable under the particular circumstances, see Haire v. Schaff (Mo. App.), 190 S. W. 56; Ft. Smith &c. R. Co. v. Holcombe, 59 Okla. 54, 158 Pac. 633, L. R. A. 1916F, 1237; Chicago &c. R. Co. v. Lillard, 62 Okla. 63, 161 Pac. 779; and compare New York &c. R. Co. v. Vizvari, 210 Fed. 118, L. R. A. 1915C, 9.

[9] Cincinnati &c. R. Co. v. Phinney, 38 Ind. App. 546, 77 N. E. 296; Gulf &c. R. Co. v. Blockman, 87 Miss. 192, 39 So. 479. See also Dean v. Kansas &c. R. Co., 199 Mo. 386, 97 S. W. 910; Fasani v. New York &c. R. Co., 109 App. Div. 404, 96 N. Y. S. 415, affirmed in 190 N. Y. 515, 83 N. E. 1125. See also as to proximate cause, Nichols v. Central Trust Co., 43 Ind. App. 64, 86 N. E. 878; Goransson v. Riter &c. Co., 186 Mo. 300, 85 S. W. 338. And see Langhorn &c. Co. v. Wiley, 28 Ky. L. 1186, 91 S. W. 255.

[10] Baltimore &c. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624. In the case cited the court adopted as authority the cases of Gottlieb v. New York &c. R. Co., 100 N. Y. 462, 3 N. E. 344; Goodrich v. New York &c. R. Co., 116 N. Y. 398, 22 N. E. 397, 5 L. R. A. 750, 15 Am. St. 410. The doctrine asserted in Baltimore &c. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624, is upheld by other decisions of the same court and is affirmed by other courts. Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; Louisville &c. R. Co. v. Williams, 95 Ky. 199, 24 S. W. 1, 44 Am. St. 214; Bomar v. Louisiana &c. R. Co., 42 La. Ann. 983; Fay v. Minneapolis &c. R. Co., 30 Minn. 231, 15 N. W. 241, 11 Am. & Eng. R. Cas. 193; Mateer v. Missouri &c. R. Co., 105 Mo. 320, 15 S. W. 970; Jones v. New York &c. R. Co., 92 N. Y. 628; Mason v. Richmond &c. R. Co., 111 N. Car. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. 814; Dooner v. Delaware &c. R. Co., 164 Pa. St. 17, 10 Am. R. & Corp. R. 264, 30 Atl. 269; Missouri &c. R. Co. v. White, 76 Tex. 102, 13 S. W. 65, 18 Am. St. 33; International &c. R. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668, 9 L. R. A. 703 and note, 22 Am. St. 52; Texas

inspect,[11] while still other cases seem to hold that there is a duty to conduct an inspection for obvious defects but not for latent ones.[12] It is by no means easy to define the duty of a railroad company in relation to foreign cars because of the conflict of authority as well as because of the difficulty inherent in the subject. If the defects are obvious, then upon the long and well-established principle that defects open to observation must be observed by the employe and that risks from such defects are assumed as risks of the service, the employer would not ordinarily be liable, so that it is difficult to support by satisfactory reasoning the doctrine of the cases which hold that

&c. R. Co. v. O'Fiel, 78 Tex. 486, 15 S. W. 33; Missouri &c. R. Co. v. Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090, 1093 (citing text); Galveston &c. R. Co. v. Harns (Tex. Civ. App.), 172 S. W. 1129; Reynolds v. Boston &c. R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. 908. See also Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 So. 415; Bender v. St. Louis &c. R. Co., 137 Mo. 240, 37 S. W. 142; Atchison &c. R. Co. v. Penfold, 57 Kans. 148, 45 Pac. 574; Keith v. New Haven &c. R. Co., 140 Mass. 175, 3 N. E. 28; Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408, 13 L. R. A. 465. In Moon v. Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. 194, it was held that the company which furnished the car to the company by whom the injured was employed was liable to the servant.

[11] Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Chicago &c. R. Co. v. Neves, 130 Ill. App. 340; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 445, 20 N. E. 287, 10 Am. St. 67; Neutz v. Jackson &c. Co., 139 Ind. 411, 38 N. E. 324, 39 N. E. 147; Baldwin v. Chicago &c. R. Co., 50 Iowa 680; Mackin v. Boston &c. R. Co., 135 Mass. 201, 46 Am. Rep. 456; Keith v. New Haven &c. R. Co., 140 Mass. 175, 3 N. E. 28; Thyng v. Fitchburg &c. R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425; Michigan &c. R. Co. v. Smithson, 45 Mich. 212; Smith v. Flint &c. R. Co., 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161; Hathaway v. Michigan Cent. R. Co., 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569; Railroad Co. v. Fitzpatrick, 42 Ohio St. 318; Whitman v. Wisconsin &c. R. Co., 58 Wis. 408, 17 N. W. 124.

[12] Chicago &c. R. Co. v. Fry, 131 Ind. 319, 28 N. E. 989; Gutridge v. Missouri Pacific R. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. 392; Missouri Pacific R. Co. v. Barber, 44 Kans. 612, 24 Pac. 969; Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980. See Texas &c. R. Co. v. Charlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151; Toledo &c. R. Co. v. Asbury, 84 Ill. 429; McMullen v. Carnegie Co., 158 Pa. St. 518, 27 Atl. 1043, 23 L. R. A. 448. It is suffi-

the company is guilty of actionable negligence if it does not provide against obvious defects in foreign cars. So, too, there is much difficulty in supporting the cases which hold that there is a general duty to inspect, for the well-established principle is that an employer is bound to use ordinary care in making inspections and ordinary care depends upon time, means and opportunity to a great extent, and it is a matter of which judicial notice must be taken that the requirements and exigencies of commerce often render it necessary to forward cars without delay. If a car laden with perishable articles is delayed the company is liable in the event that injury to the articles results from the delay. There is much reason for the doctrine that employes are held to have knowledge of the customs and requirements of commerce and must be held to assume the risks arising from obedience to such customs and requirements. We venture the opinion, not, indeed, without hesitation, that the rule most consistent with principle is that where there is time and opportunity for inspection then one must be made with ordinary care and skill, but if the exigencies and requirements are such that there is no time or opportunity for inspection a railroad company is not guilty of culpable negligence in failing to inspect. Where there is no defect in the cars received from another company, although buffers may be of unequal height, the company receiving them is not guilty of negligence in using them if the buffers are of a kind commonly used.[13] If the company would not be liable to the employe if the car were its own it cannot be liable no matter which one of the conflicting lines of decisions be regarded as expressing the law.

cient if it is made with ordinary care, considering the time, place and opportunity. Louisville &c. R. Co. v. Bates, 146 Ind. 564, 569, 45 N. E. 108; Ballou v. Chicago &c. R. Co., 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31.

[13] Northern Pac. R. Co. v. Blake, 63 Fed. 45, citing Michigan &c. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150; Chicago &c. R. Co. v. Linney, 59 Fed. 45, 48; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Baldwin v. Chicago &c. R. Co., 50 Iowa 680; Hathaway v. Michigan &c. R. Co., 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569; Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980. See also Louisville &c. R. Co. v. Boland, 96 Ala. 626, 11 So. 667,

§ 1839. Inspection of foreign cars—May depend on circumstances.—As indicated in the last preceding section we think the better rule as to the inspection of foreign cars is that there is a duty to inspect where opportunity permits, but that the nature of the inspection must depend largely on the exigencies of the business and the time and place of the opportunity.[14] Many, though by no means all, of the apparently conflicting cases may be reconciled under this rule, for in a number of those holding that no inspection was required, or that it was sufficient, there was no opportunity under the exigencies of the business to make any further inspection and in many of those holding that an inspection, or further inspection was required there was no such reasonable inspection as opportunity offered. The rule requiring an inspection by a transportation company as a duty to its employes is held not to apply to a company receiving a car owned by another company upon its siding merely to be unloaded.[15] And, on the other hand, even though foreign cars are not ordinarily required to be inspected, this rule does not apply in strictness to foreign cars possessed and used by a company for its own business.[16]

18 L. R. A. 260; Simms v. South Carolina R. Co., 26 S. Car. 490, 2 S. E. 486; Norfolk &c. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; Whitcomb v. Standard Oil Co., 153 Ind. 513, 518, 55 N. E. 440. In Northern &c. Pac. R. Co. v. Blake, 63 Fed. 45, the cases of Louisville &c. R. Co. v. Fawley, 110 Ind. 18, 9 N. E. 594; Missouri Pac. R. Co. v. Callbreath, 66 Tex. 526, 1 S. W. 622; Hungerford v. Chicago &c. R. Co., 41 Minn. 444, 43 N. W. 324, and Reynolds v. Boston &c. R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. 908, are distinguished.

[14] See New York &c. R. Co. v. Hamlin, 170 Ind. 20, 83 N. E. 343, 15 Ann. Cas. 988; Louisville &c. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108, and cases there cited; O'Flanagan v. Missouri Pac. R. Co., 145 Mo. App. 276, 129 S. W. 1019. Many of the cases cited in the preceding section also support this doctrine.

[15] Haskell &c. Car Co. v. Przezdziankowski, 170 Ind. 1, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. 352, citing other Indiana cases and also McGill v. Maine &c. Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. 618; McMullen v. Carnegie Bros. & Co., 158 Pa. St. 518, 27 Atl. 1043, 23 L. R. A. 448. See also McGinley v. Lehigh Coal Co., 224 Pa. St. 408, 73 Atl. 552.

[16] McNamara v. Boston &c. R. Co., 202 Mass. 491, 89 N. E. 131.

§ 1840 (1280). Employer's duty to promulgate rules.—One of the duties of a railroad company to its employes is to promulgate rules for the conduct of its business and the government of its employes.[17] The duty to promulgate rules is a personal duty and cannot be delegated,[18] that is, the master cannot escape the

[17] Hough v. Railway Co., 100 U. S. 213, 25 L. ed. 612; Crew v. St. Louis &c. R. Co., 20 Fed. 87; Seaboard Air Line R. Co. v. Shanklin, 148 Fed. 342; Illinois &c. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Chicago &c. R. Co. v. Taylor, 69 Ill. 461, 18 Am. Rep. 626; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 219, 12 N. E. 380; Chicago &c. R. Co. v. Hamerick, 50 Ind. App. 425, 96 N. E. 649; Cooper v. Central R. Co., 44 Iowa 134; Kansas &c. R. Co. v. Salmon, 14 Kans. 512; Chesapeake &c. R. Co. v. Barnes, 132 Ky. 728, 117 S. W. 261; Cumberland &c. R. Co. v. State, 44 Md. 283; Ford v. Fitchburg &c. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Mason v. St. Louis &c. R. Co., 161 Mo. App. 610, 143 S. W. 551; Smith v. Boston &c. R. Co., 73 N. H. 325, 61 Atl. 359; Gaudette v. Boston &c. R. Co., 74 N. H. 597, 64 Atl. 667; Smith v. Oxford &c. R. Co., 42 N. J. L. 467, 36 Am. Rep. 535; Abel v. President &c., 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; Ford v. Lake Shore &c. R. Co., 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454; Corcoran v. Delaware &c. R. Co., 126 N. Y. 673, 27 N. E. 1022; Morgan v. Hudson &c. R. Co., 133 N. Y. 666, 31 N. E. 234; Lake Shore &c. R. Co. v. Lavalley, 36 Ohio St. 221; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. 631; Haynes v. East Tennessee &c. R. Co., 3 Cold. (Tenn.) 222; St. Louis &c. R. Co. v. Arms (Tex. Civ. App.), 136 S. W. 1164; Gulf &c. R. Co. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. 51; Merrill v. Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85; Vose v. Lancashire &c. R. Co., 2 H. & N. 128. As to what is sufficient promulgation or notice of the rule to employes, see LaCroy v. New York &c. R. Co., 132 N. Y. 570, 30 N. E. 391; Grady v. Southern R. Co., 92 Fed. 491; St. Louis &c. R. Co. v. Puckett, 88 Ark. 204, 114 S. W. 224; St. Louis &c. R. Co. v. Blaylock, 117 Ark. 504, 75 S. W. 1170, Ann. Cas. 1917A, 563n; Georgia Pac. R. Co. v. Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 324 and note; Port Royal &c. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833; Evansville &c. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39; Louisville &c. R. Co. v. Bocock, 107 Ky. 223, 51 S. W. 580; Anderson v. Great Northern R. Co., 102 Minn. 355, 113 N. W. 913; Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326, 28 Atl. 376; Abel v. Delaware &c. R. Co., 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; Pilkinton v. Gulf &c. R. Co., 70 Tex. 226, 7 S. W. 226; Stone v. Union Pac. R. Co., 35 Utah 305, 100 Pac. 362; Norfolk &c. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522.

[18] Valente v. American Bridge Co., 6 Pen. (Del.) 556, 73 Atl. 395; Merrill v. Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85.

liability to an employe injured because of a failure to promulgate rules by entrusting the duty to an agent or employe. It seems clear on principle that the duty of the employer to promulgate rules and the duty of the employes to obey them are reciprocal and that disobedience should defeat a recovery where it proximately contributes to the injury unless it is clearly established that the rules were abrogated.[19] As we have elsewhere said there is, as we believe, a tendency in the wrong direction upon this subject insomuch as, according to some of the cases, employes by continued disobedience may practically annul all rules. The employer is under a duty to use reasonable care to establish such rules as will make it reasonably safe for the employes to perform the duties required of them by their contract of service, but if ordinary care is exercised in framing rules there is no actionable breach of duty although accidents may occur. If the employer adopts and enforces such rules as experience shows to be reasonably necessary the duty required by law is discharged, since it is obvious that ordinary care, which is the measure of duty, does not require that rules shall be framed that will meet every emergency or contingency that may arise in railroad service.[20] The fact that the master does not pro-

[19] Humphres v. Western Pac. Ry. Co., 173 Cal. 428, 160 Pac. 415, 419 (citing text); Sloan v. Georgia Pac. R. Co., 86 Ga. 15, 12 S. E. 179; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Green v. Brainerd &c. R. Co., 85 Minn. 318, 88 N. W. 974, 976 (citing text); Benage v. Lake Shore &c. R. Co., 102 Mich. 72, 60 N. W. 286; post §§ 1843, 1881. But compare Louisville &c. R. Co. v. Bowling, 177 Ky. 462, 197 S. W. 928, L. R. A. 1918C, 376.

[20] Atchison &c. R. Co. v. Carruthers, 56 Kans. 309, 43 Pac. 230; Doing v. New York &c. R. Co., 73 Hun 270, 26 N. Y. S. 405; Pearsall v. New York &c. R. Co., 189 N. Y. 474, 81 N. E. 752, 121 Am. St. 909; Kudik v. Lehigh &c. R. Co., 78 Hun 492, 29 N. Y. S. 533. Ely v. New York &c. R. Co., 88 Hun 323, 34 N. Y. S. 739; McDugan v. New York &c. R. Co., 10 Misc. 336, 31 N. Y. S. 135; Gulf &c. R. Co. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. 51. See also Olsen v. North Pac. &c. Co., 100 Fed. 384; Texas &c. R. Co. v. Echols, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517; Voss v. Delaware &c. R. Co., 62 N. J. L. 59, 41 Atl. 224; Morgan v. Hudson River &c. Co., 133 N. Y. 666, 51 N. E. 234. But compare Nolan v. New York &c. R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 and note; Terre Haute &c. R. Co. v. Becker, 146 Ind. 202, 45 N. E.

mulgate rules is not of itself sufficient to entitle an employe who is injured in the service of his employer to recover, for it must appear in order to charge the master that the failure to promulgate rules was the proximate cause of the injury, nor will such failure shield the employe from the consequences of his contributory negligence.[21] The employer is not charged with the absolute duty of securing an observance of rules, but is bound to exercise ordinary care and diligence to secure an observance of the rules.[22] The cases are not agreed as to whether the question of the sufficiency and reasonableness of rules is a question of law or of fact, and it is difficult to lay down a general rule that will justly apply to all cases, but we think that ordinarily the question is one of law[23] for the court.

96; Holmes v. Southern Pac. Co., 120 Cal. 357, 52 Pac. 652; Crew v. St. Louis &c. R. Co., 20 Fed. 87.

[21] Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154. See also Kasesak v. Central R. Co., 101 N. Y. S. 211.

[22] Rutledge v. Missouri Pac. R. Co., 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327. In all such matters in adopting and enforcing rules the standard is ordinary or reasonable care. Kansas City &c. R. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723; Berrigan v. New York &c. R. Co., 131 N. Y. 582, 30 N. E. 57. But it is said that the master's duty is not performed by merely promulgating the rules and using ordinary care in selecting men to enforce them. Merrill v. Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85. See generally as to the duty to enforce the rules. Dixon v. Grand Trunk &c. R. Co., 155 Mich. 169, 118 N. W. 946; Anable v. New York &c. R. Co., 122 N. Y. S. 713, 138 App. Div. 380. In Pittsburg R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218, it is held that an allegation that an engineer violated a rule of the company is not sufficient to show actionable negligence per se, and that it must also be shown that the plaintiff relied upon the observance of the rule, and was thereby misled to his injury, or the like.

[23] Little Rock &c. R. Co. v. Barry, 84 Fed. 949; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Hoffbauer v. Davenport R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; Old Colony &c. R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. 661, 33 Am. & Eng. R. Cas. 488, note; Tracy v. New York &c. R. Co., 9 Bos. (N. Y.) 396; Larow v. New York &c. R. Co., 61 Hun 11, 15 N. Y. S. 384; Tullis v. Hassell, 54 N. Y. Sup. Ct. 391; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.) 128. See also Rosney v. Erie R. Co. 135 Fed. 311; Huggins v. Southern R. Co., 148 Ala. 153, 41 So. 856; Birmingham &c. R. Co. v. Mosely, 164 Ala. 111, 51 So. 424; Wallace v.

There may be cases where the ordinary rule cannot be justly applied,[24] but they seldom arise.

§ 1841 (1281). **Time-tables or schedules.**—It is, as a general rule, the duty of a railroad company to cause time-tables or schedules to be prepared. This duty rests, as we think, upon the same principle as that upon which the duty to make rules is founded. The duty of the company is to exercise reasonable care in the preparation of such tables or schedules, and for a negligent breach of this duty the company is liable to an employe who has a right to rely upon such schedules or tables, and who is free from contributory fault. But this rule does not, by any means, extend to all employes, for some of them are bound to keep out of the way of extra or wild trains as well as scheduled trains. It is held that the duty to prepare time-schedules is one that cannot be delegated.[25] While it is the duty of the railroad company to cause time-tables to be prepared, it is not bound to adhere to them without change, but, on the contrary, it may change them at its discretion. Where, however, changes are made, reasonable notice or warning of changes should be given.[26] The employer is not liable, however, for the act of a fellow servant who fails in matters of detail respecting time-tables.[27]

Boston &c. R. Co., 72 N. H. 504, 57 Atl. 913. But see Shepard v. Northern &c. R. Co., 63 Hun 634, 18 N. Y. S. 665; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Prather v. Richmond &c. R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; Ford v. Lake Shore &c. R. Co., 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454.

[24] Bass v. Chicago &c. Co., 36 Wis. 450, 17 Am. Rep. 495; Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Pittsburg &c. R. Co. v. Henderson, 37 Ohio St. 549. See also Chicago &c. R. Co. v. McLallen, 84 Ill. 109; Morgan v. New York &c. R. Co., 133 N. Y. 666, 31 N. E. 234. For cases involving construction of particular rules, see White's Supp. Thomp. Neg. § 4172.

[25] Frost v. Oregon &c. R. Co., 69 Fed. 936. See Baltimore &c. R. Co. v. Camp, 65 Fed. 952; Jackson v. Wheeling &c. R. Co., 65 W. Va. 415, 64 S. E. 450.

[26] Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Sears v. Eastern &c. R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780; Gordon v. Manchester &c. R. Co., 52 N. H. 596, 13 Am. Rep. 97; Rose v. Boston &c. R. Co., 58 N. Y. 217; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. 631.

[27] Authorities preceding note.

An employe who does not conform to the schedule rules is guilty of contributory negligence, when his failure is a proximate cause of his injury, unless just reason exists for his failure to conform to them.[28]

§ 1842 (1282). **Violation of rules by employes.**—It is the duty of the employes of a railroad company to obey the rules of the company in force and applicable, and a failure to obey such rules will defeat a recovery by the injured employe if his injury was the proximate result of a failure to obey the rules of the employer.[29] In an Indiana case an employe was injured in the operation of an unguarded saw, for which the company had furnished a guard, which was placed within easy access of the employe, together with a notice, known to him, and requiring

[28] A conductor has been presumed to know a rule printed on the back of a time table. Frounfelker v. Delaware &c. R. Co., 74 App. Div. 224, 77 N. Y. S. 470. See also generally as to the presumption of knowledge of rules. Brennan v. Mich. Cent. R. Co., 93 Mich. 156, 53 N. W. 358; Oleson v. Chicago &c. R. Co., 38 Minn. 412, 38 N. W. 353. And where a rule on the time table covers the subject it is held that no other rule is necessary. Terre Haute &c. R. Co. v. Becker, 146 Ind. 202, 45 N. E. 96.

[29] Russell v. Richmond &c. R. Co., 47 Fed. 204; New Jersey &c. R. Co. v. Young, 49 Fed. 723; Atchison &c. R. Co. v. Reesman, 60 Fed. 370, 23 L. R. A. 768; Kansas City &c. R. Co. v. Dye, 70 Fed. 24; Lake Erie &c. R. Co. v. Craig, 80 Fed. 488; Great Northern R. Co. v. Hooker, 170 Fed. 154; Southern R. Co. v. Ritch, 185 Fed. 717; Robertson v. Cornelson, 34 Fed. 716; Richmond &c. R. Co. v. Free, 97 Ala. 231, 12 So. 294; Richmond &c. R. Co. v. Thomason, 99 Ala. 471, 12 So. 273; Louisville &c. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. 128; Humphres v. Western Pac. Ry. Co., 173 Cal. 428, 160 Pac. 415, 419 (citing text); Sloan v. Georgia &c. R. Co., 86 Ga. 15, 12 S. E. 179; East Tennessee &c. R. Co. v. Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Abend v. Terre Haute &c. R. Co., 111 Ill. 202, 53 Am. Rep. 616 and note; Quick v. Indianapolis &c. R. Co., 130 Ill. 334, 22 N. E. 709; Mischke v. Chicago &c. R. Co., 56 Ill. App. 472; Matchett v. Cincinnati &c. R. Co., 132 Ind. 334, 31 N. E. 792; Cincinnati &c. R. Co. v. Lang, 118 Ind. 579, 21 N. E. 317; Cleveland &c. R. Co. v. Oesterling, 182 Ind. 481, 103 N. E. 401; Conners v. Burlington &c. R. Co., 74 Iowa 383, 37 N. W. 966; Elmgren v. Chicago &c. R. Co., 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N. S.) 754; Karrer v. Detroit &c. R. Co., 76 Mich. 400, 43 N. W. 370; Wilson v. Michigan Cent. R. Co., 94 Mich. 20, 53

him to place it in position when using the saw, it was held that he was guilty of contributory negligence in violating such rule and could not recover;[30] but this decision has been disapproved by the Supreme Court of Oregon in a similar case.[31] Courts generally hold that if it is customary to disobey the rules, then disobedience will not defeat a recovery.[32] This doctrine, in the extent to which it is carried by some of the cases, seems to us to be unsound, for the safety of the public requires obedience to the rules, and so does the duty which an employe undertakes

N. W. 797; Olson v. St. Paul &c. R. Co., 38 Minn. 117, 35 N. W. 866; Burris v. Minneapolis &c. R. Co., 95 Minn. 30, 103 N. W. 717; Schaub v. Hannibal &c. R. Co., 106 Mo. 74, 16 S. W. 924; McGucken v. Western &c. R. Co., 77 Hun 69, 28 N. Y. S. 298; Smith v. New York &c. R. Co., 88 Hun 468, 34 N. Y. S. 881; Davis v. Staten Island &c. R. Co., 1 App. Div. 178, 37 N. Y. S. 157; Louisville &c. R. Co. v. Wilson, 88 Tenn. 316, 12 S. W. 720; Gulf &c. R. Co. v. Ryan, 69 Tex. 665, 7 S. W. 83; Pilkinton v. Gulf &c. R. Co., 70 Tex. 226, 7 S. W. 805; Receivers of International &c. R. Co. v. Moore, 3 Tex. Civ. App. 416, 22 S. W. 272; Cumpston v. Texas &c. R. Co. (Tex. Civ. App.), 33 S. W. 737; Richmond &c. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274; Darracott v. Chesapeake &c. R. Co., 83 Va. 288, 2 S. E. 511, 5 Am. St. 266; Southern Ry. Co. v. Johnson, 111 Va. 499, 69 S. E. 323, Ann. Cas. 1912A, 81, and note citing many authorities by states and reviewing a number of them. See Cameron v. New York &c. R. Co., 145 N. Y. 400, 40 N. E. 1; Gordy v. New York &c. R. Co., 75 Md. 297, 32 Am. St. 291; Green v. Brainerd &c. R. Co., 85 Minn. 318, 88 N. W. 974, 976 (citing text); Bist v. London &c. R. Co., (1907) A. C. 209, 8 Ann. Cas. 1; post, § 1881. An agreement to obey the rules of the company and to release it from injuries caused by a violation of the rules, is not a contract exempting the company from liability for its own negligence. Runnell v. Richmond &c. R. Co., 47 Fed. 204.

[30] Cleveland &c. R. Co. v. Oesterling, 182 Ind. 481, 103 N. E. 401.

[31] Camenzind v. Furniture Co., 89 Ore. 158, 174 Pac. 139, 147, expressly disapproving said Indiana case and approving Baltimore &c. R. Co. v. Cavanaugh, 35 Ind. App. 32, 71 N. E. 239.

[32] Smith v. Memphis &c. R. Co., 18 Fed. 304; Northern Pacific R. Co. v. Nickels, 50 Fed. 718; Chicago &c. Ry. Co. v. Smith, 115 Ark. 473, 172 S. W. 829; Chicago &c. R. Co. v. Flynn, 154 Ill. 448, 40 N. E. 332; Strong v. Iowa &c. R. Co., 94 Iowa 380, 62 N. W. 799; Fish v. Illinois &c. R. Co., 96 Iowa 702, 65 N. W. 995; Barry v. Hannibal &c. R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. 610; Schaub v. Railway Co., 106 Mo. 74, 16 S. W. 924; Texas &c. R. Co. v. Leighty (Tex. Civ. App.), 32 S. W. 799. See also Duncan v. Atchison &c. R. Co., 86

to perform to the public and to co-employes. It may be proper to hold that where there is frequent and long-continued failure to regard the rules, and such failure is known to the superior officers or agents of the company, or ought to be known to them, the inference that they have been entirely abrogated may be just, and if so, then a violation of them will not necessarily bar a recovery;[33] but where the rules have not been abrogated, although often disobeyed, an employe who disobeys them should not, as we believe, be allowed to recover damages from his employer where the violation is the proximate cause of the injury. The question is, as it seems to us, to be determined by ascertaining whether the rules have been abrogated, and not simply by ascertaining whether or not they have been disobeyed in some instances. It has been held that the command of the conductor to go between the cars operates as a waiver of a rule forbidding such an act,[34] but we believe this doctrine to be unsound for the reason that a conductor has no authority

Kans. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565 n; Louisville &c. R. Co. v. Bowling, 177 Ky. 462, 197 S. W. 926, L. R. A. 1918C, 376; Louisville &c. R. Co. v. Hiltner, 22 Ky. L. 1141, 60 S. W. 2; Galvin v. Old Colony R. Co., 162 Mass. 533, 39 N. E. 186; McNee v. Coburn &c. Co., 170 Mass. 283, 49 N. E. 437; Eastman v. Lake Shore &c. R. Co., 101 Mich. 597, 60 N. W. 309; Leduc v. Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108; White v. Louisville &c. R. Co., 72 Miss. 12, 16 So. 248; Bordeaux v. Atlantic &c. R. Co., 150 N. Car. 528, 64 S. E. 439, 29 L. R. A. (N. S.) 935; Wright v. Southern Pac. R. Co., 14 Utah 383, 46 Pac. 374; Merrill v. Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85; note in Ann. Cas. 1912A, 89.

[33] Biles v. Seaboard Air Line R. Co., 139 N. Car. 528, 52 S. E. 129; 5 Thomp. Neg. § 5404; White's Supp. § 5404. See also Campbell v. Chicago &c. R. Co., 149 Ill. App. 120, affirmed in 243 Ill. 620, 90 N. E. 1106; Bussey v. Charleston &c. R. Co., 78 S. Car. 352, 58 S. E. 1015.

[34] Mason v. Richmond &c. R. Co., 111 N. Car. 482, 53 Am. & Eng. R. Cas. 183, 18 L. R. A. 845, 16 S. E. 698, 32 Am. St. 814. The court held that the conductor was not a fellow-servant but the representative of the company, citing Patton v. Western &c. R. Co., 96 N. Car. 455, 1 S. E. 863; Central R. Co. v. De Bray, 71 Ga. 406; Boatwright v. Northwestern &c. R. Co., 25 S. Car. 128; Coleman v. Wilmington &c. R. Co., 25 S. Car. 446, 60 Am. Rep. 516; Louisville &c. R. Co. v. Brooks, 83 Ky. 129, 4 Am. St. 135. See also St. Louis &c. R. Co. v. Puckett, 88 Ark. 204.

to waive or annul an established rule of the service. The true doctrine is that asserted by the cases which hold that rules established by the company cannot be waived or annulled by subordinate agents or servants,[35] at least where the master has no knowledge thereof. Where the injury is not caused by an act done in disobedience to the rules of the company, but is caused by a negligent breach of duty by the company, with which the violation of the rules has no proximate connection,

114 S. W. 224. If it were granted that the conductor is not the fellow-servant of a brakeman, still, with deference to the able court that gave the decision upon which we are commenting, we venture to say the conclusion would not follow, for conductors have no authority to make or unmake the fundamental rules of the service. See Atchison &c. R. Co. v. Reesman, 60 Fed. 371; Richmond &c. R. Co. v. Finley, 63 Fed. 228; Richmond &c. R. Co. v. Rush, 71 Miss. 987, 15 So. 133; Port Royal &c. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833. In St. Louis &c. R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749, it is held that habitual violation by brakemen of a rule where such violation is known to the conductors is sufficient evidence of its abandonment, waiver or abrogation. Citing Cleveland &c. R. Co. v. Baker, 91 Fed. 224; Tullis v. Lake Erie &c. R. Co., 105 Fed. 554; Mason v. Richmond &c. R. Co., 111 N. Car. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. 814, and some of the other cases cited in the second note to this section.

[35] Atchison &c. R. Co. v. Reesman, 60 Fed. 370, 23 L. R. A. 768; Richmond &c. R. Co. v. Finley, 63 Fed. 228; George &c. R. Co. v. Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. 47; Richmond &c. R. Co. v. Rush, 71 Miss. 987, 15 So. 133; Penn. R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Houston &c. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; Virginia &c. R. Co. v. Roach, 83 Va. 375, 5 S. E. 175; Shenandoah &c. R. Co. v. Lucado, 86 Va. 390, 10 S. E. 422. See also Gleason v. Detroit &c. R. Co., 73 Fed. 647; Central R. &c. Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; Loranger v. Lake Shore &c. R. Co., 104 Mich. 80, 62 N. W. 137; Port Royal &c. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833. But it is held that constructive as well as actual notice may be sufficient; Alabama &c. R. Co. v. Roach, 110 Ala. 266, 20 So. 132; Fish v. Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Alexander v. Louisville &c. R. Co., 83 Ky. 590; Texas &c. R. Co. v. Leighty (Tex. Civ. App.), 32 S. W. 800; Lake Erie &c. R. Co. v. Craig, 80 Fed. 488; Barry v. Hannibal &c. R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. 610. Most of these cases hold habitual violation for a long time sufficient to charge the master with knowledge.

the employe may recover, although he may have violated the rules.[36]

§ 1843. Construction of rules—Violation usually negligence per se—Excuse—Discretion.—Where rules are in writing their construction is for the court.[37] And if they are ambiguous, or so general that they may admit of more than one interpretation in their practical application to the facts, they are usually to be construed most strongly against the master.[38] In such a case an employe might not be guilty of contributory negligence merely because he misconstrued or misapplied them in a rea-

[36] Schauffele v. Central &c. R. Co., 6 Ga. App. 660, 65 S. E. 708; Dickson v. Omaha &c. R. Co., 124 Mo. 140, 27 S. W. 478, 25 L. R. A. 320 and note, 46 Am. St. 429; Ford v. Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598; Mills v. Atlantic &c. R. Co., 85 S. Car. 463, 67 S. E. 565, 21 Ann. Cas. 144; Clarke v. Holmes, 7 H. & N. 937. See also Richmond &c. R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652; Miami Coal Co. v. Kane, 45 Ind. App. 391, 90 N. E. 13; Reed v. Burlington &c. R. Co., 72 Iowa 166, 33 N. W. 451, 2 Am. St. 243; Illinois Cent. R. Co. v. Stith, 27 Ky. L. 596, 85 S. W. 1173; Louisville &c. R. Co. v. Payne's Admr., 177 Ky. 462, 197 S. W. 920; Pollard v. Maine Cent. R. Co., 87 Maine 51, 32 Atl. 735; Dickson v. Omaha &c. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320 and note, 46 Am. St. 429. The failure to obey rules is usually held to defeat a recovery upon the ground that it constitutes contributory negligence, but it seems to us that, in strictness, it is a positive breach of duty and not merely contributory negligence. Rules of service are part of the contract of employment, and the employe undertakes to obey them, so that if he disobeys them he is guilty of a breach of affirmative duty, assumed by him. Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 219, 12 N. E. 380.

[37] Great Northern R. Co. v. Hooker, 170 Fed. 154; Louisville &c. R. Co. v. Sewell, 142 Ky. 171, 134 S. W. 162. For construction given various rules, see White's Supp., Thomp. Neg. § 4172, and in note in Ann. Cas. 1912A, 87, 88. But if there is reasonable ground for difference of opinion as to their application to the particular facts, or as to whether they were properly promulgated and in force, and as to whether the employe had or should have taken notice of them, these questions may be for the jury. Cincinnati &c. R. Co. v. Lovell, 141 Ky. 249, 132 S. W. 569, 47 L. R. A. (N. S.) 909 n.

[38] Austin v. Central &c. R. Co., 3 Ga. App. 775, 61 S. E. 998; Clary v. Chicago &c. R. Co., 141 Wis. 411, 123 N. W. 649; Great Northern R. Co. v. McDermid, 177 Fed. 105, 21 Ann. Cas. 665. A special rule

sonable way. Ordinarily, however, the violation of the master's rule may be, and usually is, regarded as negligence per se, and the great weight of authority is to the effect that, when the evidence clearly shows that the injury complained of was caused by a needless violation of a valid and reasonable rule, promulgated and in force for the protection of the class of employes to which the injured party belonged, under such circumstances as attended the accident, the court is warranted in pronouncing the act negligence as a matter of law.[39] But it is said in one of the cases in which this doctrine of violation of a rule constituting negligence per se is most strongly stated and enforced that "it does not follow that no explanation can be made by the employe."[40] And in another recent case it is said: "There are, however, a great many circumstances attending the violation of rules which modify the act and give it such character, with respect to negligence, as will make it a question for the jury. It has been held that among these circumstances and conditions are the following: If it is shown, that an observance of a rule is impossible or impracticable for want of some necessary instrumentality or other good reason; that the employe had no knowledge of the rule, either actual or constructive, or had no knowledge, either actual or imputed, that the conditions

as to extraordinary conditions has been held, where they exist, to supercede a general rule. Birmingham R. &c. Co. v. Mosely, 164 Ala. 111, 51 So. 424. Practical construction by the parties may be of controlling effect. Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723.

[39] Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 542, 87 N. E. 723, citing Somerset &c. R. Co. v. Galbraith, 109 Pa. St. 32, 1 Atl. 371; Lake Erie &c. R. Co. v. Craig, 80 Fed. 488, 47 U. S. App. 647, 660; Memphis &c. R. Co. v. Graham, 94 Ala. 545, 552, 10 So. 283; Abend v. Terre Haute &c. R. Co., 111 Ill. 202, 53 Am. Rep. 616; Sedgwick v. Ill. Cent. R. Co., 76 Iowa 340, 41 N. W. 35; Sutherland v. Troy &c. R. Co., 125 N. Y. 737, 26 N. E. 609; Louisville &c. R. Co. v. Heck, 151 Ind. 292, 50 N. E. 988. See also Louisville &c. R. Co. v. Woodwad, 176 Fed. 5; St. Louis &c. R. Co. v. Dupree, 84 Ark. 377, 105 S. W. 878, 120 Am. St. 74; Southern R. Co. v. Johnson, 111 Va. 499, 69 S. E. 323, Ann. Cas. 1912A, 81 and note.

[40] Elmgren v. Chicago &c. R. Co., 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N. S.) 754, 756.

which invoked the exercise of the rule existed at the time of the accident; that a rule is ambiguous or uncertain in its application, and a bona fide, though erroneous, effort was made to comply with it; that there was a failure to recognize the pertinency of the rule to present conditions, such failure being consistent with a reasonable construction of the rule; that a violation is induced by some urgent emergency; that the compliance with said rule is in conflict with some other paramount duty, it should be, in all such cases, left to the jury, under proper instructions, to characterize the violation as constituting negligence or due care."[41] This seems to be, in the main at least, a correct statement of matters that may modify or limit the general doctrine or its application. There are other cases that are to much the same effect and also permit some latitude or discretion on the part of the employe in complying with general rules under particular circumstances.[42]

§ 1844 (1283). **Duty to warn employe of danger.**—The general rule is that where the danger is an extraordinary one, that is, a danger not ordinarily incident to the service, and the employer has knowledge of such danger, he is guilty of negligence if he fails to warn the employe.[43] Where, however, the danger is obvious to a person of ordinary intelligence and one that can

[41] Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 543, 87 N. E. 723. See also as supporting the statement as to some of these modifying circumstances. Huggins v. Southern R. Co., 159 Ala. 189, 49 So. 299; Bussey v. Charleston &c. R. Co., 78 S. Car. 352, 58 S. E. 1015; Galveston &c. R. Co. v. Worth, 53 Tex. Civ. App. 351, 116 S. W. 365, and cases cited in next following note.

[42] Denver &c. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681; Cleveland &c. R. Co. v. Quinn, 54 Ind. App. 11, 22, 101 N. E. 406; Veit v. Ann Arbor R. Co., 150 Mich. 358, 114 N. W. 233; Somerset &c. R. Co. v. Galbraith, 109 Pa. St. 32, 39, 1 Atl. 371. See also Eastman v. Lake Shore &c. R. Co., 101 Mich. 597, 60 N. W. 309. This doctrine, giving the employe latitude and discretion in obeying a rule, should be confined to its proper limits and not be unduly extended. There certainly can not be much latitude or discretion allowed the employe as to whether or how he will obey a plain and reasonable rule under ordinary circumstances.

[43] Consolidated &c. R. Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Louisville &c. R. Co. v. Wright,

be known and appreciated by a person who exercises ordinary prudence and care,[44] or where it is not an extraordinary peril but is one incident to the service, there is no duty to give warning unless the person employed has not reached the years of discretion or the master has reason to believe that he is inexperienced and requires warning. Where the danger is open to the observation of a person of ordinary intelligence the general rule is that the employer is not guilty of negligence in failing to give the employe warning of such danger, since the risk is

115 Ind. 378, 387, 16 N. E. 145, 17 N. E. 584, 7 Am. St. 432; Hunn v. Michigan &c. R. Co., 78 Mich. 513, 4 N. W. 502, 7 L. R. A. 500; Erickson v. St. Paul &c. R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; Brennan v. Gordon, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818, 16 Am. St. 775; Blanchard v. Delaware &c. R. Co., 211 N. Y. 79, 105 N. E. 90; Curran v. Lake Champlain &c. R. Co., 211 N. Y. 60, 105 N. E. 105; Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720; Bannon v. Lutz, 158 Pa. St. 166, 27 Atl. 890. See generally Wolski v. Knapp &c. Co., 90 Wis. 178, 63 N. W. 87; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. ed. 464; Northwestern &c. Co. v. Danielson, 57 Fed. 915; Burke v. Anderson, 69 Fed. 814; Fort Smith &c. Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Elledge v. National &c. Co., 100 Cal. 282, 34 Pac. 852, 38 Am. St. 290; Williams v. Walton, 9 Houst. (Del.) 322, 32 Atl. 726; Barnes v. Rembarz, 150 Ill. 192, 37 N. E. 239; Salem Stone Co. v. Griffin, 139 Ind. 141, 38 N. E. 411; Missouri &c. R. Co. v. Walker (Tex.), 26 S. W. 513; Houston &c. R. Co. v. Rutland, 45 Tex. Civ. App. 621, 101 S. W. 529; Craven v. Smith, 89 Wis. 119, 67 N. W. 317. See also Standard Oil Co. v. Brown, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. ed. 939, 20 Ann. Cas. 980; Chicago &c. R. Co. v. Riley, 145 Fed. 137, 7 Ann. Cas. 327; Turner v. Atchison &c. R. Co., 83 Kans. 315, 111 Pac. 433; Texarkana &c. R. Co. v. Brandon, 59 Tex. Civ. App. 451, 126 S. W. 703; White's Supp. Thomp. Neg. §§ 4055, 4059.

[44] Chicago &c. R. Co. v. Shalstrom, 195 Fed. 725, 45 L. R. A. (N. S.) 387; Myers v. DePauw Co., 138 Ind. 590, 38 N. E. 37; Cleveland &c. R. Co. v. Perkins, 171 Ind. 307, 86 N. E. 405, 23 L. R. A. (N. S.) 197n; Railsback v. Wayne &c. Co., 10 Ind. App. 622, 38 N. E. 221; Hathaway v. Illinois &c. R. Co., 92 Iowa 337, 60 N. W. 651; Yeager v. Burlington &c. R. Co., 93 Iowa 1, 61 N. W. 215; Hardy v. Chicago &c. R. Co., 139 Iowa 314, 115 N. W. 8, 19 L. R. A. (N. S.) 997 and note; Atchison &c. R. Co. v. Weikal, 73 Kans. 763, 84 Pac. 720; Blankenship v. Norfolk &c. R. Co., 147 Ky. 260, 143 S. W. 995; Burns v. Washburn, 160 Mass. 457, 36 N. E. 199; Junior v. Missouri &c. Co., 127 Mo. 79, 29 S. W. 988; Nugent v. Kauffman Co., 131 Mo. 241, 33 S. W. 428. See generally Siddall

assumed by the employe.[45] The rule just stated has been held to apply to one who solicits and accepts employment as a brakeman, although he informs the company that he has had no experience in that capacity.[46] Where a danger arises from the use of the working place or appliances and is caused by changing their condition or character and the new or increased danger is known to the employer but not to the employe, and is not open to his observation, it is the duty of the employer to give the employe warning.[47] It has been held that where an employe is ordered from his usual position to one of more danger it is the duty of the employer to warn him of the dangers of the position to which he is ordered,[48] but, as we believe, this doc-

v. Pacific Mills Co., 162 Mass. 378, 38 N. E. 969; Louisville &c. R. Co. v. Bouldin, 121 Ala. 197, 25 So. 903; Cleveland &c. R. Co. v. Haas, 35 Ind. App. 627, 74 N. E. 1003; Bryant v. Great Northern Paper Co., 100 Maine 171, 60 Atl. 797; Rock v. Indian Orchard Mills Co., 142 Mass. 522, 8 N. E. 401; Ciriack v. Merchants' &c., 146 Mass. 182, 15 N. E. 579, 4 Am. St. 307; Pratt v. Prouty, 153 Mass. 333, 26 N. E. 1002; Meehan v. Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61; Western Union Tel. Co. v. McMullen, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 35 and note; Burns v. Pethcal, 75 Hun 437, 27 N. Y. S. 499; Ford v. Anderson, 139 Pa. St. 261, 21 Atl. 18; Paoline v. J. W. Bishop Co., 25 R. I. 298, 55 Atl. 752. But compare Chicago Term. &c. R. Co. v. O'Donnell, 114 Ill. App. 345, affirmed in 72 N. E. 1133; and see generally note in 44 L. R. A 33.

[45] Findlay v. Russell Wheel &c. Co., 108 Mich. 286, 66 N. W. 50; Jennings v. Tacoma &c. R. Co., 7 Wash. 275, 34 Pac. 937; East &c. R. Co. v. Sims, 80 Ga. 807, 84 Ga. 152, 6 S. E. 595, 20 Am. St. 352; Patton v. Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149.

[46] McDermott v. Atchison &c. R. Co., 56 Kans. 319, 43 Pac. 248. But see Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 So. 415.

[47] Bjbjian v. Woonsocket &c. Co., 164 Mass. 214, 41 N. E. 265; Burns v. Vesta Coal Co., 223 Pa. St. 473, 72 Atl. 800. See also Galveston &c. R. Co. v. Manns, 37 Tex. Civ. App. 356, 84 S. W. 254; Bradburn v. Wabash R. Co., 134 Mich. 575, 96 N. W. 929. The decision in Louisville &c. R. Co. v. Binion, 107 Ala. 645, 18 So. 75, in some respects goes further than the weight of authority warrants. See Michael v. Roanoke &c. Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. 927; Seery v. Gulf &c. R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623, 50 L. R. A. 47.

[48] Quinn v. Johnson &c. Co., 9 Houst. (Del.) 338, 32 Atl. 858. See also Keller v. Gaskill, 20 Ind. App. 502, 50 N. E. 363; Brazil Block

trine can only apply where the employe is ordered into a position essentially different from that to which he was assigned by his contract of service. The duty to give warning does not, as a rule, exist where the employe is old enough to comprehend the dangers of the service and is familiar with the appliances with which he is required to work,[49] but where there is a change in the condition of the working place or appliances augmenting the danger, and that fact is known to the employer and not to the employe, then it is the duty of the master, if there be reasonable opportunity to do so, to give notice to the employe of such danger.[50] If the servant obtains knowledge of the

Coal Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. 422; Osborn v. Adams Brick Co., 52 Ind. App. 175, 99 N. E. 531; Olson v. Nebraska Tel. Co., 87 Nebr. 593, 127 N. W. 916; Eliff v. Oregon R. &c. Co., 53 Ore. 66, 99 Pac. 76; Texarkana &c. R. Co. v. Brandon, 59 Tex. Civ. App. 451, 126 S. W. 703. And of dangers from other work or extraneous causes, Schroeder v. Chicago &c. R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Pullman's Palace Car Co. v. Harkins, 55 Fed. 932; Paterson v. Wallace, 28 Eng. L. & Eq. 51.

[49] Keats v. National &c. Co., 65 Fed. 940; Hoyle v. Excelsior &c. Co., 95 Ga. 34, 21 S. E. 1001; Pinkley v. Chicago &c. R. Co., 246 Ill. 370, 92 N. E. 896, 35 L. R. A. (N. S.) 679 n. and note; Harney v. Chicago &c. R. Co., 139 Iowa 359, 115 N. W. 886; Poneh v. Union Pac. R. Co., 83 Kans. 226, 109 Pac. 771; Mackin v. Alaska &c. Co., 100 Mich. 276, 58 N. W. 999; Manley v. Laconia St. R. Co., 75 N. H. 465, 76 Atl. 81; Cronin v. Columbian Mfg. Co., 75 N. H. 319, 24 Atl. 180, 29 L. R. A. (N. S.) 111n and note; Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Bellows v. Pennsylvania &c. Co., 157 Pa. St. 51, 27 Atl. 685; Norman v. Southern R. Co., 119 Tenn. 401, 104 S. W. 1088; Dougherty v. West Superior &c. Co., 88 Wis. 343, 60 N. W. 274. Compare Texas &c. R. Co. v. Sherman (Tex. Civ. App.), 87 S. W. 887 with Galveston &c. R. Co. v. Sherwood (Tex. Civ. App.), 67 S. W. 776. See also San Antonio &c. Co. v. Noll, 37 Tex. Civ. App. 269, 83 S. W. 900; Mueller v. La Prelle &c. Co., 109 Mo. App. 506, 84 S. W. 1010; Parish v. Missouri &c. R. Co. (Tex. Civ. App.), 76 S. W. 234; St. Louis &c. R. Co. v. Spivey, 97 Tex. 143, 76 S. W. 748. It is held that one entering into a contract of employment impliedly represents that he knows his duties and how to perform them. Wiggins v. Seaboard &c. R. Co., 154 N. Car. 577, 70 S. E. 932.

[50] Seaboard Air Line R. Co. v. Witt, 4 Ga. App. 149, 60 S. E. 1012; Knox v. American Rolling Mill, 236 Ill. 437, 86 N. E. 90, 127 Am. St. 291; Texarkana &c. R. Co. v. Casey (Tex. Civ. App.), 172 S. W. 729; ante note 47. See also Southern R. Co. v. Howerton, 182 Ind.

dangers from a fellow-servant or some other source he cannot recover against the master upon the sole ground that the master failed to instruct or warn him.[51] Many of the courts hold that it is the duty of the employer to warn the employe of latent dangers,[52] and some very broad statements are made in the opinions of the courts. The doctrine is one to be carefully qualified and limited, for it will not do to say that there is always a duty to warn employes of all latent dangers, for in every line of business where complicated or powerful machinery is used there are latent dangers incident to the service, and there are some that the master could not discover by the exercise of ordinary care, and of such dangers it is not the duty of the employer to warn the employe; but if the latent danger is not incident to the service and is known to the employer and not to the employe it is the duty of the former to exercise reasonable care and diligence to give the latter notice. Children and adults do not stand upon the same footing, and the duty of the employer is not so narrow and limited where children of tender years are employed as it is where adults or persons who have reached the years of discretion are taken into his service. But even as to children the duty to warn

208, 105 N. E. 1025, 106 N. E. 369 (duty to warn where torpedo placed on track). The duty to give notice in such cases is not an absolute duty, but is one requiring the exercise of reasonable care and diligence. If reasonable care and diligence are used then the master can not be deemed guilty of negligence. See for cases in which a railroad company was held not chargeable with notice and not bound to warn an employe of the viciousness of a Texas steer. Clark v. Missouri &c. R. Co., 179 Mo. 66, 77 S. W. 882.

[51] Truntle v. North Star &c. Co., 57 Minn. 52, 58 N. W. 832. See also Nye v. Dutton, 187 Mass. 549, 73 N. E. 654; Blair v. Heibel, 103 Mo. App. 621, 77 S. W. 1017; Jones v. Louisville &c. R. Co., 95 Ky. 576, 26 S. W. 590; Yeager v. Burlington &c. R. Co., 93 Iowa 1, 61 N. W. 215.

[52] Holland v. Tennessee &c. R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232; Louisville &c. R. Co. v. Binion, 107 Ala. 645, 18 So. 75; Crown Cotton Mills v. McNally, 123 Ga. 35, 51 S. E. 13; Louisville &c. R. Co. v. Graham, 124 Ind. 89, 24 N. E. 668; Smith v. Peninsular Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. 542 and note; Bell v. Northern Pac. R. Co., 112 Minn.

and instruct is not an absolute one,[53] for if reasonable care and diligence are exercised the employer's duty is performed, but what is reasonable care and diligence depends in a great degree upon the age of the child, the dangers of the service and like matters. We cannot enter into a discussion of the general subject of the employer's duty to children whom he takes into his service, nor can we undertake to cite all of the cases upon the subject, but must content ourselves with citing a few of the great number.[54] One who studies the cases will

488, 128 N. W. 829; Hall v. Wabash R. Co., 165 Mo. App. 114, 145 S. W. 1169; Stackman v. Chicago &c. R. Co., 80 Wis. 428, 50 N. W. 404. But compare Lord v. Boston &c. R. Co., 74 N. H. 39, 65 Atl. 111; Bennett v. Concord &c. Co., 74 N. H. 400, 68 Atl. 460; Masterson v. Nomquit Worsted Mills, 32 R. I. 5, 78 Atl. 258; note in 21 L. R. A. (N. S.) 90.

[53] Pratt v. Prouty, 153 Mass. 333, 26 N. E. 1002; Tinkham v. Sawyer, 153 Mass. 485, 27 N. E. 6; Armstrong v. Forg, 162 Mass. 544, 39 N. E. 190; Stuart v. West End Co., 163 Mass. 391, 40 N. E. 180; Schliermann v. Hammond &c. Co., 11 Misc. 546, 32 N. Y. S. 748; Luebke v. Berlin &c. Works, 88 Wis. 442, 60 N. W. 711, 43 Am. St. 913. See also Ford v. Bodcaw Lumber Co., 73 Ark. 49, 83 S. W. 346; W. B. Conkey Co. v. Larsen, 173 Ind. 585, 91 N. E. 163, 29 L. R. A. (N. S.) 116; Cronin v. Columbian Mfg. Co., 75 N. H. 319, 74 Atl. 180, 29 L. R. A. (N. S.) 111n and note; Diehl v. Standard Oil Co., 70 N. J. L. 424, 57 Atl. 131.

[54] Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553, 21 L. ed. 739; Wallace v. Standard Oil Co., 66 Fed. 260; Louisville &c. R. Co. v. Wilson, 162 Ala. 588, 50 So. 188; Mullin v. California &c. Co., 105 Cal. 77, 38 Pac. 535; Wynne v. Conklin, 86 Ga. 40, 12 S. E. 183; Atlanta &c. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763; Bibb &c. Co. v. Taylor, 95 Ga. 615, 23 S. E. 188; Louisville &c. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Evansville &c. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Yeager v. Burlington &c. Co., 93 Iowa 1, 61 N. W. 215; Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Coullard v. Tecumseh &c., 151 Mass. 85, 23 N. E. 731; Ciriack v. Merchants' &c. Co., 151 Mass. 152, 23 N. E. 829, 6 L. R. A. 733, 21 Am. St. 438; McGinnis v. Canada &c. R. Co., 49 Mich. 466, 13 N. W. 819; Steiler v. Hart, 65 Mich. 644, 32 N. W. 875; McIntosh v. Missouri &c. R. Co., 58 Mo. App. 281; Ferguson v. Smith, 15 Misc. 251, 36 N. Y. S. 415; DeGraff v. New York &c. R. Co., 76 N. Y. 125; Cleveland &c. Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385, 15 Am. St. 596; Rummel v. Dilworth, 131 Pa. St. 509, 19 Atl. 345, 17 Am. St. 827; Tagg v. McGeorge, 155 Pa. St. 368, 26 Atl. 671; Neilson v. Hillside &c. Co., 168 Pa. St. 256, 31 Atl. 1091, 47 Am. St. 886; Texas

find great confusion and hopeless conflict. So, there may be a duty to warn and instruct inexperienced servants,[55] when it is clear that they are incompetent to understand the work and danger, where no such duty would exist as to experienced employes. The duty to warn and instruct is a personal duty of the master, and he cannot escape the consequences of a failure to perform it by delegating it to an agent or servant.[56] It is not necessary that warning be given in express words, for it may be conveyed in any mode which fairly and reasonably directs the employe's attention to the danger.[57]

§ 1845 (1284). Duty to employ competent servants.—It is the company's duty to employes to exercise ordinary care in securing the services of competent co-employes.[58] It is not

&c. R. Co. v. Plummer, 57 Tex. Civ. App. 563, 22 S. W. 942; Turner v. Norfolk &c. R. Co., 40 W. Va. 675, 22 S. E. 83; Ryan v. Northern Pac. R. Co., 53 Wash. 279, 101 Pac. 880; Chopin v. Badger &c. Co., 83 Wis. 192, 53 N. W. 452; Casey v. Chicago &c. R. Co., 90 Wis. 113, 62 N. W. 624. For additional authorities and treatment of the subject see also notes in 29 L. R. A. (N. S.) 111, in 8 L. R. A. (N. S.) 284, 14 L. R. A. (N. S.) 383 and 123 Am. St. 966; White's Supp., Thom. Neg. §§ 4091-4099.

[55] Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553, 21 L. ed. 739; Thompson v. Chicago &c. R. Co., 14 Fed. 564; American Mfg. Co. v. Zulkowski, 185 Fed. 42; Fisk v. Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. 22; Atlanta &c. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763; Nordhaus v. Vandalia R. Co., 147 Ill. App. 274; Louisville &c. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Hungerford v. Chicago &c. R. Co., 41 Minn. 444, 43 N. W. 324; Goins v. Chicago &c. R. Co., 37 Mo. App. 221; White's Supp., Thomp. Neg. § 4101.

[56] Messinger v. New York &c. R. Co., 85 Conn. 467, 83 Atl. 631; Pullman &c. Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Consolidated Stone Co. v. Ellis, 46 Ind. App. 80, 91 N. E. 1095; Vohs v. Shorthill, 130 Iowa 538, 107 N. W. 417; Glass v. Hazen Confectionery Co., 211 Mass. 99, 97 N. E. 627; note in 26 L. R. A. (N. S.) 624.

[57] Louisville &c. R. Co. v. Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260; Shuster v. Philadelphia &c. R. Co., 6 Pen. (Del.) 4, 62 Atl. 689, 4 L. R. A. (N. S.) 407n.

[58] Baltimore &c. R. Co. v. Henthorne, 73 Fed. 634; Southern Pac. R. Co. v. Hetzer, 135 Fed. 272; Pennsylvania R. Co. v. Hartell, 157 Fed. 667; Still v. San Francisco &c. R. Co., 154 Cal. 559, 98 Pac. 672, 20 L. R. A. (N. S.) 322n, 129 Am. St. 177; Furlong v. New York &c. R. Co., 83 Conn. 568, 78 Atl. 489;

bound, however, as is sometimes said, to employ competent fellow servants, but it is bound to use reasonable care in employing fellow servants.[59] If reasonable care is exercised there is no breach of duty, although it may turn out that the fellow servant was in fact incompetent. Where special knowledge and skill are required in order to qualify an employe to properly discharge the duties of the position assigned him then it is the duty of the employer to exercise ordinary care to secure the services of persons reasonably well qualified in skill, knowl-

Chicago &c. R. Co. v. Moranda, 108 Ill. 576; Chicago &c. R. Co. v. Harney, 28 Ind. 28, 92 Am. Dec. 282; Evansville &c. R. Co. v. Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. 458; Indianapolis &c. Co. v. Boyle, 18 Ind. App. 169, 47 N. E. 690; Lawler v. Androscoggin &c. R. Co., 62 Maine 463, 16 Am. Rep. 492 and note; Baltimore &c. R. Co. v. Neal, 65 Md. 438, 5 Atl. 338; Keith v. New Haven &c. Ry. Co., 140 Mass. 175, 3 N. E. 28; Peaslee v. Fitchburg Ry. Co., 152 Mass. 155, 25 N. E. 71; Moss v. Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126; Hilton v. Fitchburg R. Co., 73 N. H. 116, 59 Atl. 625; Baulec v. New York &c. R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Huntington &c. R. Co. v. Decker, 84 Pa. St. 419; Hughes v. Baltimore &c. R. Co., 164 Pa. St. 178, 30 Atl. 383, 44 Am. St. 597; Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878; Harding v. Ostrander R. Co., 64 Wash. 224, 116 Pac. 635. In Gulf &c. R. Co. v. Hays, 40 Tex. Civ. App. 162, 89 S. W. 29, this rule is applied and it is held that the general reputation of the employe as incompetent is admissible as tending to charge the company with notice. See also Indiana Union Trac. Co. v. Pring, 50 Ind. App. 566, 96 N. E. 180; Norfolk &c. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710 and note, 47 Am. St. 392; Johnson v. St. Paul &c. Coal Co., 126 Wis. 492, 105 N. W. 1048. The duty can not be delegated so as to relieve the master. Pittsburg R. Co. v. Thomas, 174 Fed. 591; Furlong v. New York &c. R. Co., 83 Conn. 568, 78 Atl. 489, 21 Ann. Cas. 937; Gregory v. Chicago &c. R. Co., 42 Mont. 551, 113 Pac. 1123.

[59] Pittsburg v. Thomas, 174 Fed. 591; Bertha &c. Co. v. Martin, 93 Va. 791, 22 S. E. 869. In Baulec v. New York &c. R. Co., 59 N. Y. 356, 17 Am. Rep. 325, it was said: "It is equally well settled that when reasonable precautions and efforts to procure safe and skillful servants are used and without fault, one is employed through whose incompetency damage occurs to a fellow servant, the master is not liable." Citing Laning v. New York &c. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Wright v. New York &c. R. Co., 25 N. Y. 562; Tarrant v. Webb, 18 C. B. 797; Ormond v. Holland, El. Bl. & El. 102. See also Mich. Cent. R. Co. v. Dolan,

edge or experience for the position, but where the duties of the position do not require special skill, experience or knowledge, the employer in employing unskilled or inexperienced persons is not necessarily guilty of negligence.[60]

§ 1846 (1285). Presumption of competency of employe.—The fact that a person old enough to comprehend the dangers of the service in which he seeks to engage applies for employment authorizes the employer, so far as the rights of the employe himself are concerned, to assume that he is qualified to perform the duties of the position for which he makes application. The rule we have stated is, however, a general one. There may, perhaps, be positions of unusual danger which it would be negligence on the part of the master to permit a servant to occupy without some inquiry into his experience or competency. But in railroad service there are few positions of that nature and the general rule must be that which we have stated. We are speaking, we add to prevent misunderstanding of our meaning, of cases where the servant is seeking to fasten a liability upon the master, and not of cases where the master is sought to be held liable by third persons. A railroad company is under no obligation to examine an applicant for employment as to his fitness and qualification for the position he seeks, except perhaps where the applicant is a child

32 Mich. 510; Conrad v. Gray, 109 Ala. 130, 19 So. 398; Reiser v. Penna. R. Co., 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. 620; Wabash R. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. ed. 605. And it is essential to liability of the master on this ground that he knew or at least ought to have known of the incompetency, and that it was a proximate cause of the injury. Cabin Branch Min. Co. v. Hutchinson's Admx., 112 Va. 37, 70 S. E. 480, Ann. Cas. 1912D, 93n. See also Igo v. Boston El. Co., 204 Mass. 197, 90 N. E. 274; Sage v. Baltimore &c. R. Co., 219 Pa. St. 129, 67 Atl. 985; Gulf &c. R. Co. v. Hays, 40 Tex. Civ. App. 162, 89 S. W. 79.

[60] Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Mobile &c. R. Co. v. Smith, 59 Ala. 245; Tyson v. South &c. R. Co., 61 Ala. 554, 32 Am. Rep. 8; Smoot v. Mobile &c. R. Co., 67 Ala. 13; Holland v. Tennessee &c. R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232; Tinne v. Mich. Cent. R. Co., 98 Mich. 226, 57 N. W. 116. In the first of the cases cited the rule that conformity to usage and custom repels the in-

of tender years.[61] The cases hold that unless the age of the applicant is such as to convey information of inexperience or incapacity the presumption is that he is competent to perform the duties of the position for which he applies.[62] It is held, and justly, that one who represents that he is competent to discharge the duties of a brakeman cannot recover for injuries received by him in coupling cars, when such injury was attributable to his lack of skill and knowledge.[63]

§ 1847 (1286). Burden of proof where incompetency of fellow servant is alleged.—The presumption is that the employer exercised reasonable care in employing fellow servants, and that presumption until overthrown stands as a prima facie case.[64] Negligence is not presumed except in very rare instances and in cases of a peculiar character.[65] It follows from these well-known principles that the burden of showing negligence in employing fellow servants is upon the plaintiff and in the absence of such proof there can be no recovery.[66]

ference of negligence is recognized and upon that point the court cited, Louisville &c. R. Co. v. Allen, 78 Ala. 494; Georgia &c. R. Co. v. Propst, 83 Ala. 518, 3 So. 764; Alabama &c. R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. 354.

[61] O'Neal v. Chicago &c. R. Co., 132 Ind. 110, 112, 31 N. E. 669; Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151, 166, 5 N. E. 187.

[62] Dysinger v. Cincinnati &c. Ry. Co., 93 Mich. 646, 53 N. W. 825; Wiggins v. Seaboard &c. R. Co., 154 N. Car. 577, 70 S. E. 932; Alexander v. Louisville &c. R. Co., 83 Ky. 589; Mayes v. Chicago &c. Ry. Co., 63 Iowa 562, 14 N. W. 340, 19 N. W. 680. See Lyttle v. Chicago &c. R. Co., 84 Mich. 289, 47 N. W. 571.

[63] Stanley v. Chicago &c. R. Co., 101 Mich. 202, 59 N. W. 393. See also Arcade File Works v. Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

[64] Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 818, 9 N. E. 357, 57 Am. Rep. 120; Bates v. Pickett, 5 Ind. 22, 61 Am. Dec. 73; Old National Bank v. Findley, 131 Ind. 225, 229, 31 N. E. 62.

[65] Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Brazil &c. R. Co. v. Young, 117 Ind. 520, 524, 20 N. E. 423; Baltimore &c. R. Co. v. Bahrs, 28 Md. 647; Foy v. Philadelphia &c. R. Co., 47 Md. 76; Baltimore &c. R. Co. v. State, 54 Md. 648; State v. Philadelphia &c. R. Co., 60 Md. 555; 6 Thomp. Neg. (2d ed.) § 7634, et seq.

[66] In Hermann v. Port Blakely &c. Co., 71 Fed. 853, it was said:

§ 1848 (1287). Trains to be provided with a sufficient crew.—It is the duty of a railroad company to exercise ordinary care and diligence to provide its trains with a sufficient number of persons to operate them with reasonable safety. The company by the contract of hiring impliedly undertakes that it will exercise ordinary care to provide an adequate number of persons to prevent the employes engaged in running the train from being exposed to unusual or extraordinary hazards.[67] If ordi-

"No negligence on the part of the company in employing and selecting the particular individual was shown, and so far as that feature of the case is concerned, it may be taken as conceded that he was competent. The legal presumption is that he was competent, and that the master discharged the duty to the libelant in that respect, no proof to the contrary having been submitted." Beasley v. San Jose Fruit Packing Co., 92 Cal. 388, 28 Pac. 485; Summerhays v. Kansas City &c. R. Co., 2 Colo. 484; Ohio &c. R. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702; Evansville &c. R. Co. v. Tohill, 143 Ind. 49, 41 N. E. 709; Louisville &c. R. Co. v. Breedlove, 10 Ind. App. 657, 38 N. E. 359; Gilman v. Eastern &c. R. Co., 10 Allen (Mass.) 233, 87 Am. Dec. 635; Davis v. Detroit &c. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Tucker v. Missouri &c. Tel. Co., 132 Mo. App. 418, 112 S. W. 6; Wright v. New York &c. R. Co., 25 N. Y. 562; Rose v. Boston &c. R. Co., 58 N. Y. 217; Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603; Geoghegan v. Atlas &c. Co., 146 N. Y. 369, 40 N. E. 507; Drake v. New York &c. R. Co., 80 Hun 490, 30 N. Y. S. 671; McDermott v. Daniell, 121 App. Div. 736, 106 N. Y. S. 496; 4 Thomp. Neg. (2d ed.) § 4906. See also O'Neill v. O'Leary, 164 Mass. 387, 41 N. E. 662; Mobile &c. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416 (citing text); Kindel v. Hall, 8 Colo. App. 63, 44 Pac. 781; Denver &c. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. 243; Murray v. Denver &c. R. Co., 11 Colo. 124, 17 Pac. 484; Colorado &c. Iron Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251. And the plaintiff must show that he had no knowledge of the incompetency. Spencer v. Ohio &c. Ry. Co., 130 Ind. 181, 29 N. E. 915; Peterson v. New Pittsburg &c. Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. 289.

[67] Masner v. Atchison &c. R. Co., 177 Fed. 618; Denver &c. R. Co. v. Reiter, 47 Colo. 417, 107 Pac. 1100; Pennsylvania &c. R. Co. v. McCaffrey, 139 Ind. 430, 439, 38 N. E. 67, 29 L. R. A. 104; Luisi v. Chicago &c. R. Co., 155 Iowa 458, 136 N. W. 322; Flike v. Boston &c. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Booth v. Boston &c. R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Mad River &c. R. Co. v. Barber,

nary care is exercised the company is not liable since negligence is the test of liability and if ordinary care is exercised there can be no negligence. As a general rule at least, where the company conforms to the usages and customs that commonly prevail it discharges its duty, for there is ordinarily no negligence where an employer does what is generally done by others in the same line of business. There is not, as the language of some of the books seems to indicate, an absolute duty to provide an adequate force of train men, for the employer is not an insurer, nor is he held to a higher degree of care than ordinary or reasonable care. Recent statutes in some jurisdictions, generally known as "full crew acts," and their effect, if any, on this common law doctrine will be considered in a subsequent chapter.[68]

§ 1849 (1288). **Assumption of risks of service—General doctrine.**—One who enters the service of a railroad company assumes all the ordinary risks of such service.[69] He assumes such risks as are ordinarily incident to the service, not merely

5 Ohio St. 541, 67 Am. Dec. 312; Jones v. Old Dominion &c. R. Co., 82 Va. 140, 3 Am. St. 92; Johnson v. Ashland &c. R. Co., 71 Wis. 553, 37 N. W. 826, 5 Am. St. 243. See also Harty v. St. Louis &c. R. Co., 95 Mo. 368; Louisville &c. R. Co. v. Davis, 91 Ala. 487, 8 So. 552; Bonn v. Galveston &c. R. Co. (Tex. Civ. App.), 82 S. W. 808. And see as to overwork of employes by master, note in 45 L. R. A. (N. S.) 372. But if the servant knows of the insufficiency and assumes the risk he can not recover. Mad River R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Skipp v. Eastern Counties R. Co., 9 Exch. 223. But see Galveston &c. R. Co. v. Bonn, 44 Tex. Civ. App. 631, 99 S. W. 413.

[68] See as to such acts, note in 49 L. R. A. (N. S.) 979.

[69] Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150; Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391; Union &c. R. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Gravelle v. Minneapolis &c. R. Co., 10 Fed. 711; Thompson v. Chicago &c. R. Co., 14 Fed. 564; Woodworth v. St. Paul &c. R. Co., 18 Fed. 282; Easton v. Houston &c. R. Co., 39 Fed. 65; Davidson v. Southern Pacific R. Co., 44 Fed. 476; Bohn &c. Co. v. Erickson, 55 Fed. 943; Chicago &c. R. Co. v. Shalstrom, 195 Fed. 725, 45 L. R. A. (N. S.) 387; O'Neal v. Chicago &c. R. Co., 132 Ind. 110, 31 N. E. 609; Tobey v. Burlington &c. R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496; Louisville &c. R. Co. v. McMillen (Ky.), 119 S. W. 221; Paland v.

such as are necessarily incident to the service he enters.[70] He does not assume extraordinary and unknown risks caused by a negligent breach of duty on the part of the employer.[71] He may, however, where he knows thereof and appreciates the danger, and voluntarily continues the work, be precluded from recovery,[72] and this doctrine has been extended in some jurisdictions even to cases in which he ought, in the exercise of reasonable care, or by ordinary observation, to have ascertained

Chicago &c. R. Co., 44 La. Ann. 1003, 11 So. 707; Clark v. St. Paul &c. R. Co., 28 Minn. 128, 9 N. W. 581; Carlson v. Oregon &c. R. Co., 21 Ore. 450, 28 Pac. 497; Kelley v. Silver Spring &c. R. Co., 12 R. I. 112, 34 Am. Rep. 615 and note; Nashville &c. R. Co. v. Elliott, 1 Cold. (Tenn.) 611, 78 Am. Dec. 506; Gulf &c. R. Co. v. Hohl (Texas), 29 S. W. 1131; International &c. R. Co. v. Arias, 10 Texas 190, 30 S. W. 446; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; McDonald v. Norfolk &c. R. Co., 95 Va. 98, 27 S. E. 821 (citing text); Seymour v. Maddox, 16 Q. B. 326; Ryan v. Canada &c. R. Co., 10 Ont. R. 745. Many additional cases are cited and reviewed in the elaborate note in 28 L. R. A. (N. S.) 1219.

[70] Texas &c. R. Co. v. Smith, 67 Fed. 524, 31 L. R. A. 321 and note; Missouri &c. R. Co. v. Wood (Tex.), 35 S. W. 879. Risks such as "commonly attend the business" are assumed. Gulf &c. R. Co. v. Kizziah, 86 Texas 81, 23 S. W. 578. See also Houston &c. R. Co. v. Smith (Tex. Civ. App.), 38 S. W. 51.

[71] Choctaw & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 25, 48 L. ed. 96; Southern &c. R. Co. v. Burke, 60 Fed. 704; Anglin v. Texas &c. R. Co., 60 Fed. 553; Chicago &c. R. Co. v. Donovan, 160 Fed. 826, 23 L. R. A. (N. S.) 1167; Consolidated &c. R. Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Wright v. Chicago &c. R. Co., 160 Ind. 583, 66 N. E. 454; Baltimore &c. Ry. Co. v. Spaulding, 21 Ind. App. 323, 52 N. E. 410; Mellette v. Indianapolis &c. Trac. Co., 45 Ind. App. 88, 86 N. E. 432; Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; Huston v. Quincy &c. R. Co., 129 Mo. App. 576, 107 S. W. 1045; Warn v. New York &c. R. Co., 80 Hun 71, 29 N. Y. S. 897; Tanner v. Hitch, 140 N. Car. 475, 53 S. E. 287; Bannon v. Lutz, 158 Pa. St. 166, 27 Atl. 890; Missouri &c. Ry. Co. v. Smith (Tex. Civ. App.), 172 S. W. 750; Hill v. Southern Pac. Co., 23 Utah 94, 63 Pac. 814; Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097; Norfolk &c. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370; note in 28 L. R. A. (N. S.) 1220, citing additional authorities.

[72] Indianapolis Trac. &c. Co. v. Mathews, 177 Ind. 88, 97 N. E. 320, and cases cited; Louisville &c. Co. v. Sanford, 117 Ind. 265, 19 N. E. 770, and cases cited; Martin v. Des Moines &c. Co., 131 Iowa 724, 106 N. W. 359; Rose v. Minneapolis

the danger of abnormal conditions caused by the negligence of the master or other employes.[73] He has a right to expect that the employer will exercise ordinary care, but no right to expect that the employer will use a higher degree of care.[74] He assumes, as a general rule, all risks from defects in premises or appliances which are known to him, or are open and obvious

&c. R. Co., 107 Minn. 360, 120 N. W. 360, 21 L. R. A. (N. S.) 138n; Johnson v. Boston &c. R. Co., 78 Vt. 344, 62 Atl. 1021, 4 L. R. A. (N. S.) 856. See also Gulf &c. R. Co. v. Williams (Tex. Civ. App.), 39 S. W. 967; Griffith v. Lexington &c. R. Co., 124 Ga. 553, 53 S. E. 97, 4 L. R. A. (N. S.) 854; McCormick &c. Co. v. Zakzewski, 220 Ill. 522, 77 N. E. 147, 4 L. R. A. (N. S.) 848; Wabash R. Co. v. Ray, 152 Ind. 392, 51 N. E. 920, 922; San Antonio &c. R. Co. v. Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; McDonald v. Norfolk &c. R. Co., 95 Va. 98, 27 S. E. 821; Seldombridge v. Chesapeake &c. R. Co., 46 W. Va. 569, 33 S. E. 293. See also note in 28 L. R. A. (N. S.) 1224, 1225, 1228, et seq. But see Richmond &c. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. 827. And compare Luken v. Lake Shore &c. R. Co., 248 Ill. 377, 94 N. E. 175, 140 Am. St. 220 (doctrine of risk assumed inapplicable where it is from failure to comply with safety appliance statute).

[73] See Indianapolis Trac. &c. Co. v. Mathews, 177 Ind. 88, 100, 97 N. E. 320; Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780; Whipple v. New York &c. R. Co., 19 R. I. 587, 35 Atl. 303, 61 Am. St. 796. In St. Louis &c. Ry. Co. v. Birch, 89 Ark. 424, 117 S. W. 243, 28 L. R. A. (N. S.) 1250n, it is held that there must be actual knowledge and appreciation of the danger, but the other view is taken in the note, in which authorities on both sides are reviewed and the rule in various jurisdictions stated.

[74] Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624; Central &c. R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418; Buckley v. Gould &c. R. Co., 14 Fed. 833; Johnson v. Armour, 18 Fed. 490; Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200; La Pierre v. Chicago &c. R. Co., 99 Mich. 212, 58 N. W. 60; Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603; McNeil v. New York &c. R. Co., 71 Hun 24, 24 N. Y. S. 616; Nutt v. Southern &c. R. Co., 25 Ore. 291, 35 Pac. 653; Galveston &c. R. Co. v. Goodwin (Texas), 26 S. W. 1007. Knowledge of employe as a bar to recovery. Walsh v. Whiteley, L. R. 21 Q. B. Div. 371; Schroeder v. Michigan Car Co., 56 Mich. 132, 22 N. W. 220; Appel v. Buffalo &c. R. Co., 111 N. Y. 550, 19 N. E. 93; Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114; Randall v. Baltimore &c. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; Washington &c. R. Co. v. McDade, 135 U. S. 554, 10

to observation.[75] Where the employe and employer stand on common ground, with equal means of knowledge, ordinary risks of the service are assumed by the employe.[76] But he is not, ordinarily, bound to inspect and search for defects and does not assume risks caused by the company's failure to perform its duty, unknown to him.[77] It has been justly said in speaking

Sup. Ct. 1044, 34 L. ed. 235. It is error to unqualifiedly instruct the jury that the employer contracts not to expose the employe to other risks than those necessarily incident to the service. Per Toulmen, J., in Texas &c. R. Co. v. Smith, 67 Fed. 524, 31 L. R. A. 321 and note, citing Texas &c. R. Co. v. Minnick, 57 Fed. 362.

[75] Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114; Goff v. Norfolk &c. R. Co., 36 Fed. 299; Carpenter v. Mexican &c. R. Co., 39 Fed. 315; Pennsylvania R. Co. v. Ebaugh, 152 Ind. 531, 53 N. E. 36; Cleveland &c. R. Co. v. Perkins, 171 Ind. 307, 86 N. E. 405, 23 L. R. A. (N. S.) 197n; Wabash R. Co. v. Ray, 152 Ind. 392, 399, 400, 51 N. E. 920 (citing text); Indianapolis Trac. &c. Co. v. Mathews, 177 Ind. 88, 97 N. E. 320; Batterson v. Chicago &c. R. Co., 53 Mich. 125, 18 N. W. 584; Pahlan v. Detroit &c. R. Co., 122 Mich. 232, 233, 81 N. W. 103; Warmington v. Atchison &c. R. Co., 46 Mo. App. 159; Gulf &c. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706. See also Southern R. Co. v. Lyons, 169 Fed. 557, 25 L. R. A. (N. S.) 335n; Koth v. East St. Louis &c. R. Co., 232 Ill. 126, 83 N. E. 533, 15 L. R. A. (N. S.) 1109n; Gregory v. Chicago &c. R. Co., 42 Mont. 551, 113 Pac. 1123; Nordstrom v. Spocane &c. R. Co., 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364n.

[76] Fisk v. Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. 22; East St. Louis &c. R. Co. v. Shannon, 52 Ill. App. 420; Vincennes &c. Co. v. White, 124 Ind. 376, 24 N. E. 747; Swanson v. Lafayette, 134 Ind. 625, 33 N. E. 1033; Ames v. Lake Shore &c. R. Co., 135 Ind. 363, 35 N. E. 117; Cleveland &c. R. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073; Vandalia R. Co. v. Adams, 43 Ind. App. 664, 88 N. E. 353; Big Creek &c. Co. v. Wolf, 138 Ind. 496, 38 N. E. 52; Clark v. Missouri Pac. R. Co., 48 Kans. 654, 29 Pac. 1138; Wormell v. Maine Cent. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321; Quinn v. New York &c. R. Co., 175 Mass. 150, 55 N. E. 891; Fuller v. New York &c. R. Co., 175 Mass. 424, 56 N. E. 574; Smith v. St. Paul &c. R. Co., 51 Minn. 86, 52 N. W. 1068; Pulos v. Denver &c. R. Co., 37 Utah 238, 107 Pac. 241, Ann. Cas. 1912C, 218n; Johnson v. Chesapeake &c. R. Co., 36 W. Va. 73, 14 S. E. 432; Ives v. Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 452.

[77] Texas & P. R. Co. v. Archbold, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; New York &c. R. Co. v. O'Leary, 93 Fed. 737; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. 67; Mellette v. Indianapolis

of the master's duty to furnish safe machinery and appliances that: "It is not the absolute duty of an employer to see that the instruments and machinery are safe. The limit of his duty is reasonable care and precaution in that respect." [78] Where the employe is excusably ignorant of the facts on which the risk depends, he does not, as a rule, assume it,[79] but it is generally otherwise where he has knowledge of all the material facts.[80] The employe cannot be held to assume a risk not ordinarily incident to the employment unless he has had time and opportunity to acquire knowledge of the defect which created the danger,[81] and many of the authorities hold that there must not only be knowledge of the situation or defect but also appreciation of the danger.[82] While the general rule

&c. Trac. Co., 45 Ind. App. 88, 86 N. E. 432; Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378, 382, 49 N. E. 854; Pittsburg &c. R. Co. v. Parrish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120; McDonald v. Chicago &c. R. Co., 41 Minn. 439, 43 N. W. 380, 382, 16 Am. St. 711 and note; Railway Co. v. Lehmberg, 75 Tex. 67, 12 S. W. 840. See also Southern Ry. Co. v. McGowan, 149 Ala. 440, 43 So. 378; Hubbard v. Macon &c. R. Co., 5 Ga. App. 223, 67 S. E. 1018; Louisville &c. R. Co. v. Irby, 141 Ky. 145, 132 S. W. 393; Wirtz v. Galveston &c. R. Co., 63 Tex. Civ. App. 72, 132 S. W. 510.

[78] Brewer, J., in Canter v. Colorado &c. R. Co., 35 Fed. 41.

[79] Evansville &c. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345; Salem Stone &c. Co. v. Tepps, 10 Ind. App. 519, 38 N. E. 229; Breen v. Field, 157 Mass. 277, 31 N. E. 1075; Soeder v. St. Louis &c. R. Co., 100 Mo. 673, 13 S. W. 714, 18 Am. St. 724; Murphy v. Wabash &c. R. Co., 115 Mo. 111, 21 S. W. 862; Nichols v. Chrystal &c. Co., 126 Mo. 55, 28 S. W. 991; Bailey v. Rome &c. R. Co., 139 N. Y. 302, 34 N. E. 918. The case last cited goes very far; perhaps too far. See also Philadelphia &c. R. Co. v. Huber, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439.

[80] King v. Ford River &c. Co., 93 Mich. 172, 53 N. W. 10; Craver v. Christian, 36 Minn. 413, 31 N. W. 457, 1 Am. St. 675. See also Kirchoff v. Hohnsbehn Creamery Co., 148 Iowa 508, 123 N. W. 210; St. Louis &c. R. Co. v. Mealman, 78 Kans. 496, 97 Pac. 381, 18 L. R. A. (N. S.) 177; Mercer v. Atlantic &c. R. Co., 154 N. Car. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002n.

[81] Sherman v. Chicago &c. R. Co., 34 Minn. 259, 25 N. W. 593. See Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Wright v. Chicago &c. R. Co., 160 Ind. 583.

[82] Texas &c. R. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382; Chicago &c. R. Co. v. Knapp, 176 Ill. 127, 52 N. E. 927; Wright v. Chicago &c. R. Co., 160

is that the servant assumes the ordinary risks of the service into which he voluntarily enters, he does not necessarily assume the risks arising from a breach of the duty of the master. Negligence on the part of the master in the performance of the duty which he owes his employes creates, as a rule, an extraordinary risk and such a risk is not assumed by the employe,[83] except where with notice of the breach of duty and the attendant danger he remains in the service, or, with such

Ind. 583, 591, 66 N. E. 454; Avery v. Nordyke, 34 Ind. App. 541, 70 N. E. 888; Fitzgerald v. Connecticut &c. Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. 537; Wuotilla v. Duluth &c. Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. 832; Burns v. Delaware &c. R. Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956, and numerous authorities cited in notes in 97 Am. St. 893, and 98 Am. St. 313, 314. See also St. Louis &c. R. Co. v. Owens, 103 Ark. 61, 145 S. W. 879; Flowers v. Louisville &c. R. Co., 55 Fla. 603, 46 So. 718; Perry &c. Stone Co. v. Bennett, 46 Ind. App. 582, 93 N. E. 238; Suniga v. Atchison &c. R. Co., 94 Kans. 201, 146 Pac. 364; note in Duffey v. Consolidated &c. Coal Co., 147 Iowa 225, in 30 L. R. A. (N. S.) 1067n. But he ought to appreciate ordinary risks of such service, and can not well be heard to say that he did not appreciate the risk of an obvious defect or work, where such risk is so plain that every one ought to appreciate it.

[83] Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553, 21 L. ed. 739; Union Pac. R. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; Mexican Cent. R. Co. v. Murray, 102 Fed. 264; Trask v. California &c. R. Co., 63 Cal. 96; Chicago &c. R. Co. v. Avery, 109 Ill. 314; Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22, 45 N. E. 76, 1121; Brann v. Chicago &c. R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243; Solomon R. Co. v. Jones, 30 Kans. 601, 15 Am. & Eng. R. Cas. 201; Cumberland &c. R. Co. v. State, 44 Md. 283; Ford v. Fitchburg &c. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Dobbin v. Richmond &c. R. Co., 81 N. Car. 446, 31 Am. Rep. 512; Anderson v. Bennett, 16 Ore. 515, 19 Pac. 765, 8 Am. St. 311; Davis v. Central &c. R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173; Torians v. Richmond &c. R. Co., 84 Va. 192, 4 S. E. 339. See also Warren v. Chicago &c. R. Co., 113 Mo. App. 498, 87 S. W. 585; Mace v. H. A. Boelker Co., 127 Iowa 721, 104 N. W. 475; St. Louis &c. R. Co. v. Vestal, 38 Tex. Civ. App. 554, 86 S. W. 790; White's Supp. Thomp. Neg. §§ 4613, 4614; ante n. 71 to this section. The English cases assert a somewhat different doctrine. Wilson v. Merry, L. R. 1 H. L. Sc. App. 326; Waller v. Southeastern &c. R. Co., 2 H. & C. 102; Feltham v. England, L. R.

knowledge, makes no complaint or objection.[84] But, while this is ordinarily the rule and actual knowledge seems to be required by some courts, we think constructive knowledge may sometimes be sufficient to defeat the employe where the defect and risk are so obvious and the opportunity such that he ought to have taken notice.[85]

§ 1850 (1288a). Assumption of risks distinguished from contributory negligence—Basis of doctrine—Burden of proof.—The doctrine of assumption of risks is to be distinguished from that of contributory negligence.[86] This distinction is not always

2 Q. B. 33; Wigmore v. Jay, 5 Exch. 354. See Johnson v. Boston &c. Co., 135 Mass. 209, 46 Am. Rep. 458; Smith v. Baker, (1891) App. Cas. 325.

[84] Anthony v. Leeret, 105 N. Y. 591, 12 N. E. 561; Cunningham v. Merrimac &c. Co., 163 Mass. 89, 39 N. E. 774; Birmingham v. Pettit (D. C.), 21 Wash. L. R. 115. See also Indianapolis &c. R. Co. v. Watson, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475 n., 479; McPeck v. Central Vt. R. Co., 79 Fed. 590; St. Louis &c. R. Co. v. Davis, 54 Ark. 389, 15 S. W. 895, 26 Am. St. 48; Toledo &c. R. Co. v. Moore, 77 Ill. 217; Patten v. Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149; Ragon v. Toledo &c. R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. 336; Lee v. St. Louis &c. R. Co., 112 Mo. App. 372, 87 S. W. 12.

[85] See ante notes 72, 73, 75 to this section; also Mumford v. Chicago &c. R. Co., 128 Iowa 685, 104 N. W. 1135; De Kallands v. Washtenaw &c. Tel. Co., 153 Mich. 25, 116 N. W. 564, 16 L. R. A. (N. S.) 941 n., 15 Ann. Cas. 593; Promer v. Milwaukee &c. R. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. 905.

[86] Union P. Railway Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 25, 48 L. ed. 96; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475n., 479; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 63 L. R. A. 551; Choctaw &c. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244; Chicago &c. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 19 N. E. 770; Miner v. Connecticut River R. Co., 153 Mass. 398, 26 N. E. 994; Rase v. Minneapolis &c. Ry. Co., 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138 (where the subject is elaborately considered both in opinion and in note); Dowd v. New York &c. R. Co., 170 N. Y. 459, 63 N. E. 541; Hesse v. Columbus &c. Co., 58 Ohio St. 167, 50 N. E. 354, 355; Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, 697, 56 L.

drawn and there is some confusion in the authorities, but many carefully considered decisions and most of the text books note the distinction and base the doctrine of assumption of risks upon implied contract or waiver.[87] This, we think, is undoubtedly correct as applied to the ordinary risks of the service and such as are obvious and known, or ought to be known to the employe when he enters upon the employment; but it is not, perhaps, so clear as to risks caused by the negligence of the master and not existing at the time of entering upon the employment. In the latter class of cases, where the employe knows and appreciates the risk and yet continues the work without objection, the doctrine is sometimes based upon the

J. Q. B. N. S. 340. See also Louisville &c. R. Co. v. Kemper, 147 Ind. 561, 567, 47 N. E. 214, and authorities cited; Bradburn v. Wabash R. Co., 134 Mich. 575, 96 N. W. 929. It is often said, however, that extraordinary perils are not assumed, unless they are known and voluntarily encountered, or are obvious, and expose the servant to danger such that an ordinarily prudent man would not encounter it or continue in the performance of the employment even upon order of the master. Chicago &c. Co. v. Mueller, 203 Ill. 558, 68 N. E. 51, 53; Chicago &c. R. Co., v. Howe, 172 Ill. 601, 50 N. E. 151; Southern Pac. Co. v. Yeargin, 109 Fed. 436. See also the cases reviewed on both sides in the principal and dissenting opinions in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 63 L. R. A. 551. There is conflict and confusion among the Missouri and Minnesota cases, but most of the later decisions seem to recognize the distinction. Smith v. Winona &c. R. Co., 42 Minn. 87, 43 N. W. 968; Steinhauser v. Spraul, 127 Mo. 541, 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Roberts v. Missouri &c. Co., 166 Mo. 370, 379, 66 S. W. 155, and other cases cited in the Federal case above referred to. Compare also Schlemmer v. Buffalo &c. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 681.

[87] Narramore v. Cleveland &c. R. Co., 96 Fed. 298, 48 L. R. A. 68 and note; Jackson v. Chicago &c. R. Co., 178 Fed. 432; Choctaw &c. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837 n., 7 Ann. Cas. 430; note to Limberg v. Glenwood Lumber Co., 127 Cal. 598, 49 L. R. A. 33, 49, et seq.; Chicago &c. R. Co. v. Geary, 110 Ill. 383; Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 266, 267, 19 N. E. 770; Davis Coal Co. v. Polland, 158 Ind. 607, 613, 615, 619, 62 N. E. 492, 92 Am. St. 319; Dempsey v. Sawyer, 95 Maine 295, 49 Atl. 1035; Dowd v. New York &c. R. Co., 170 N. Y. 459, 469-472, 63 N. E. 541; 2 Thomp. Neg. 840; note in 28 L. R. A. (N. S.) 1228. See cases cited in Hunter v. Colfax &c. Coal

maxim volenti non fit injuria[88] rather than that of contractual assumption of risks, although it is difficult to distinguish between the two. This distinction, if it exists, may serve to reconcile some of the decisions upon the question of the burden of proof, but they seldom refer to any distinction, and courts adopting opposite theories have reached the same conclusion as to the burden of proof. Thus, in a recent case in New York, it is held that the doctrine of contractual assumption of risk applies not only to ordinary risks of the service but also to those caused by negligence of the defendant, known to the plaintiff before the injury, that it comes in as an implied waiver before both the negligent act and the injury, and is not like contributory negligence, which comes in between them, and that the burden is upon the master to show that the risk was assumed.[89] In a Wisconsin case, while the same result is reached, it is said that the assumption of an unusual risk is in the nature of contributory negligence, that there is no presumption that the employe assumed an unusual risk, and the burden is therefore upon the defendant to show such assumption where the risk is unusual.[90] In Iowa it has been repeatedly held that assumption of risks must be pleaded and proved by

Co., 175 Iowa 245, 154 N. W. 1037, L. R. A. 1917D, 15, Ann. Cas. 1917E, 1077n, as to this effect and also for other bases of the doctrine of assumed risk.

[88] See Central Vermont R. Co. v. Bethune, 206 Fed. 869; Denver &c. R. Co. v. Norgate, 141 Fed. 247, 6 L. R. A. (N. S.) 981 n., 5 Ann. Cas. 448; Choctaw &c. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244; O'Maley v. South Boston &c. Co., 158 Mass. 135, 32 N. E. 119, 47 L. R. A. 161 and note; Davis v. Forbes, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170, 176, 177 and note; Rase v. Minneapolis &c. R. Co., 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138 and note. In Wagner v. Boston &c. R. Co., 188 Mass. 437, 74 N. E. 919, the doctrine of contractural assumption of risks is held not to apply to concealed risks or subsequent negligence of the master. In St. Louis Cordage Co. v. Miller, 126 Fed. 495, 63 L. R. A. 551, it is said that the doctrine is placed by the authorities and sustained upon both grounds. Compare also Miller v. White Bronze Monument Co., 141 Iowa 701, 118 N. W. 518, 18 Ann. Cas. 957.

[89] Dowd v. New York &c. R. Co., 170 N. Y. 459, 63 N. E. 541.

[90] Nadau v. White River &c. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. 29.

the defendant,[91] but in a recent case the distinction is noted between risks voluntarily assumed by remaining in the service without objection and those inherent in the contract of employment, and it is held that the latter need not be pleaded as a defense.[92] There are other decisions that seem to lay down

[91] Shebek v. National Cracker Co., 120 Iowa 414, 94 N. W. 930; Sankey v. Railroad Co., 118 Iowa 39, 91 N. W. 820; Christy v. Railroad Co., 126 Iowa 428, 102 N. W. 194.

[92] Martin v. Des Moines &c. Co., 131 Iowa 724, 106 N. W. 359, 363, where it is said: "The very common use of this phrase with reference to two widely different legal propositions is doubtless responsible for the confusion here existing. When a servant enters the employment of a master, he is presumed to have taken into consideration such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. The risk thus arising, which involves no element of negligence on part of the master, the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his hands. This so-called 'assumption of risk' inheres in the contract of employment or in the relation of master and servant and need never be pleaded as a defense. A simple denial of the charge of negligence raises the question of this assumption sufficiently for all purposes of the case. If the servant brings an action against his master, alleging negligence, and succeeds only in proving that the injury he has sustained was the result of some risk naturally incident to his employment, he fails to recover because he has failed to prove negligence. The very expression, 'risks naturally incident to or inherent in the employment,' exclude ex vi termini the idea of negligence; while 'negligence,' as applied to the master, conveys with equal certainty the idea of a risk not incident to or inherent in the employment, but arising from the failure of the master to exercise the degree of care which the law requires of him for the safety of the servant. Now, generally speaking, the law never holds the servant to take upon himself the risk of injury from such failure of duty on the master's part; but to this proposition there is a well-recognized exception. While the servant, in entering upon and exercising the employment, may rightfully take it for granted that the master's duty with reference to his safety has been and will continue to be performed, yet if he knows that the master is in fact negligent in any respect, or if such negligence is so patent or obvious that as a person of ordinary capacity he ought to know it and to appreciate the danger therefrom, and with such knowledge he continues in the service without any promise on part of the master to remedy

the rule generally that the burden of proving assumption of risks is upon the defendant,[93] while still others hold that the burden is upon the plaintiff to show that he did not assume the risks.[94]

§ 1851 (1289). Assumption of risks—Employer's methods of doing business.—An employe cannot control the employer's business nor prescribe the methods of conducting it. The employer is not necessarily liable to the employe for personal injuries received by him although the employer might have adopted a safer method of conducting business.[95] The employe

or remove the defect, then he is said to have 'assumed the risk' of the master's negligence and can not recover for injury resulting to himself therefrom. . . . It is this assumption of risk, constituting, as we have already said, an exception to the general rule, which affords an affirmative defense to an action by the servant for personal injury and to be available to the master must be affirmatively pleaded and proved."

[93] Thompson v. Great Northern R. Co., 70 Minn. 219, 72 N. W. 962; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Pennsylvania R. Co. v. Jones, 123 Fed. 753; McDonald v. Champion &c. Co., 140 Mich. 401, 103 N. W. 829 (where it is caused by the negligence of the master and is not an ordinary risk of the service).

[94] Louisville &c. R. Co. v. Quinn, 14 Ind. App. 554, 43 N. E. 240; Cleveland &c. R. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932; Clark Co. Cement Co. v. Wright, 16 Ind. App. 630, 45 N. E. 817. See also Lloyd v. Hanes, 126 N. Car. 359, 35 S. E. 611; Chicago &c. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. But see Louisville &c. R. Co. v. Orr, 84 Ind. 50; Davis Coal Co. v. Polland, 158 Ind. 607, 615, 62 N. E. 492, 92 Am. St. 319. See generally as to the different senses in which the phrase "assumption of risks" is used and the burden of proof. Ross v. Chicago &c. R. Co., 243 Ill. 440, 90 N. E. 701; Duffey v. Consolidated &c. Coal Co., 147 Iowa 225, 124 N. W. 609; notes in 21 L. R. A. (N. S.) 138, in 28 L. R. A. (N. S.) 1221, et seq., and in Ann. Cas. 1912B, 461.

[95] Hewitt v. Flint &c. R. Co., 67 Mich. 61, 31 Am. & Eng. R. Cas. 249, 34 N. W. 659; Hughes v. Winona &c. R. Co., 27 Minn. 137, 6 N. W. 553; Bengston v. Chicago &c. R. Co., 47 Minn. 486, 50 N. W. 531; Smith v. Wilmington &c. R. Co., 129 N. Car. 173, 39 S. E. 805, 85 Am. St. 740, 742 (citing text); Kelley v. Chicago &c. R. Co., 53 Wis. 74, 9 N. W. 81, 5 Am. & Eng. R. Cas. 469; Naylor v. Chicago &c. R. Co., 53 Wis. 661, 11 N. W. 24, 5 Am. & Eng. R. Cas. 460; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. 806. See also Sutherland v. Garetson &c. Lumber Co., 149 Mo. App. 338, 130 S.

assumes the risks, "ordinarily incidental to his employer's business and to the employer's known manner of having it performed." [96] The rule stated charges the employe with risks arising from the mode of running trains,[97] of changing the time of trains, of moving locomotives, cars and the like.[98] An illustration of the rule is supplied by a case in which it was held that the company was not liable to a switchman who was injured because it failed to light the yard in which it required him to perform his duties.[99]

§ 1852 (1290). Risks of service—Illustrative cases.—A watchman at a roundhouse, whose duty requires him to move or assist in moving into the roundhouse engines without steam

W. 40; Ozogar v. Pierce &c. Co., 134 App. Div. 800, 119 N. Y. S. 405; Brown v. Peoples Gaslight Co., 81 Vt. 477, 71 Atl. 204, 22 L. R. A. (N. S.) 738; Dynen v. Leach, 26 L. J. Exch. N. S. 221.

[96] Texas &c. R. Co. v. Minnick, 61 Fed. 635, 638; St. Louis &c. Ry. Co. v. Jamison, 87 Ark. 511, 113 S. W. 41, 42 (citing text); Southern R. Co. v. Foster, 111 Va. 763, 69 S. W. 972. See also Griffith v. Lexington &c. R. Co., 124 Ga. 553, 53 S. E. 97, 4 L. R. A. (N. S.) 854; Wormell v. Maine Cent. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321, 325; Ladd v. New Bedford R. Co., 119 Mass. 413, 20 Am. Rep. 331; Ives v. Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 452; Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114. But it is held that he is not bound to pass judgment upon it or its adequacy. Texas & P. R. Co. v. Archibold, 170 U. S. 665, 18 Sup. Ct. 777, 779, 780, 42 L. ed. 1188.

[97] Southern Ind. R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097, 1099 (citing text). See also Cleveland &c. R. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 20 Ann. Cas. 1180; Ives v. Wisconsin Cent. R. Co., 128 Wis. 109, 107 N. W. 452; Vaundry v. Chicago &c. R. Co., 130 Wis. 283, 109 N. W. 926.

[98] Naylor v. New York &c. R. Co., 33 Fed. 801; Fordyce v. Lowman, 57 Ark. 160, 20 S. W. 1090; Kuhns v. Wisconsin &c. R. Co., 70 Iowa 561, 31 N. W. 868; Whitmore v. Boston &c. R. Co., 150 Mass. 477, 23 N. E. 220; Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112; Jolly v. Detroit &c. R. Co., 93 Mich. 370, 53 N. W. 526; Olson v. St. Paul R. Co., 38 Minn. 117, 35 N. W. 866; Larson v. St. Paul R. Co., 43 Minn. 423, 45 N. W. 722; Jackson v. Missouri Pac. R. Co., 104 Mo. 448, 16 S. W. 413; Kennedy v. Pennsylvania &c. R. Co., 1 Mon. (Pa.) 271, 17 Atl. 7. See generally Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. 910.

[99] Grant v. Union Pacific R. Co., 45 Fed. 673. See also Southern Pac. R. Co. v. Gloyd, 138 Fed. 388.

or the power to move themselves, cannot recover for injuries sustained in moving into the roundhouse such an engine where the dangers of the work are open to observation.[1] A switchman who undertakes to couple cars, having knowledge of the defective condition of the track, assumes the risk and cannot hold the employer liable.[2] An employe who does work in the line of his duty upon a bridge which is obviously a temporary and insecure structure, assumes the risk as an incident of his service.[3] It has been held that if an employe engaged in assisting other employes to hoist timber on a bridge has knowledge that there is not a sufficient number of persons to do the work with reasonable safety, he cannot recover from the employer for injuries caused by the failure to provide a sufficient force of men to do the work.[4] A switchman injured by reason of a drawhead of a locomotive being so short as to leave too small a space between the locomotive and cars to enable him to perform his duty in coupling a locomotive to a car, cannot recover

[1] Anglin v. Texas &c. R. Co., 60 Fed. 553. See Skidmore v. West Virginia &c. R. Co., 41 W. Va. 293, 23 S. E. 713.

[2] Little Rock &c. R. Co. v. Moseley, 56 Fed. 1009. See also Houston &c. R. Co. v. Smith (Tex. Civ. App.), 38 S. W. 51. See also Tuttle v. Detroit G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114. If, however, he does not know and is not chargeable with knowledge of the defect, he does not assume the risk, but he must know if ordinary care and diligence would enable him to know. Secord v. Chicago &c. R. Co., 107 Mich. 540, 65 N. W. 550. Where a freight conductor while attempting to uncouple cars tripped over semaphore wires extending along the side and under the track, and there was evidence showing that he had previously walked on the side of the track where the wires were, and he testified that he knew generally where they were, but was accustomed to walk between the rails where the wires crossed under the track, it was held for the jury whether he was familiar with the location of the wires, or by ordinary prudence should have known of the danger resulting therefrom so as to have assumed the risk. Chicago &c. R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169. See also Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652.

[3] McGrath v. Texas &c. R. Co., 60 Fed. 555.

[4] Texas &c. R. Co. v. Rogers, 57 Fed. 378. See also White v. Owosso Sugar Co., 149 Mich. 473, 112 N. W. 1125, 14 L. R. A. (N. S.) 279n, 119 Am. St. 686; Terrill v. Merrill &c. Co., 65 Wash. 225, 118 Pac. 27. But compare Dair v. New York &c. R. Co., 139 App. Div. 751, 124 N. Y. S. 295.

for injuries received in attempting to perform such duty if the insufficiency of the draw-bar was visible to him.[5] Employes who undertake to throw mail-bags onto moving trains, assume the ordinary risks of such service,[6] and the same rule applies to persons employed to work at stations where mail-bags are thrown from trains.[7] A track-walker cannot maintain an action for an injury caused by coal falling from a passing locomotive.[8] Where a brakeman has knowledge of the manner in which a car is loaded, and that there is danger, he assumes the risk of injury.[9] A freight handler who knows that the fastenings of a car door are unsafe, assumes the risk of injury from such defect.[10] A trackman or sectionman assumes the risk of injury from wild trains.[11] Brakemen assume risks from jerking motions of the train, and the like,[12] but where the engineer of the train is incompetent, and known to the company to be incom-

[5] Brooks v. Northern Pac. R. Co., 47 Fed. 687. See also Louisville &c. R. Co. v. Stanfill, 32 Ky. L. 1043, 107 S. W. 721.

[6] Coolbroth v. Maine &c. R. Co., 77 Maine 165, 21 Am. & Eng. R. Cas. 599, citing Yeaton v. Boston &c. R. Co., 135 Mass. 418, 15 Am. & Eng. R. Cas. 253; Hathaway v. Michigan &c. R. Co., 51 Mich. 253, 47 Am. Rep. 569, 12 Am. & Eng. R. Cas. 249.

[7] Muster v. Chicago &c. R. Co., 61 Wis. 325, 50 Am. Rep. 141, 18 Am. & Eng. R. Cas. 113, distinguishing Kirst v. Milwaukee &c. R. Co., 46 Wis. 489; Cummings v. National &c. Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Scott v. London Docks Co., 3 Hurl. & C. 596.

[8] Schultz v. Chicago &c. R. Co., 67 Wis. 616, 58 Am. Rep. 881, 28 Am. & Eng. R. Cas. 404. See also Gillespie v. Grand Trunk &c. R. Co., 150 Mich. 303, 113 N. W. 1116; Simpson v. Southern R. Co., 154 N. Car. 51, 69 S. E. 683. But compare Dean v. Kansas City &c. R. Co., 199 Mo. 386, 97 S. W. 910.

[9] Sisco v. Lehigh &c. R. Co., 145 N. Y. 296, 39 N. E. 958. But see Dewey v. Detroit &c. R. Co., 97 Mich. 329, 56 N. W. 756, 22 L. R. A. 292, 37 Am. St. 348, 38 Central L. J. 31; Atchison &c. R. Co. v. Seeley, 54 Kans. 21, 37 Pac. 104.

[10] Cassady v. Boston &c. R. Co., 164 Mass. 168, 41 N. E. 129.

[11] Pennsylvania R. Co. v. Wachter, 60 Md. 395; Shepard v. Boston &c. R. Co., 158 Mass. 174, 33 N. E. 508; Lynch v. Boston &c. R. Co., 159 Mass. 536, 34 N. E. 1072; Sullivan v. Fitchburg &c. R. Co., 161 Mass. 125, 36 N. E. 751; Hinz v. Chicago &c. R. Co., 93 Wis. 16, 66 N. W. 718; Vaundry v. Chicago &c. R. Co., 130 Wis. 283, 109 N. W. 926. See Ring v. Missouri &c. R. Co., 112 Mo. 220, 20 S. W. 436.

[12] Fordyce v. Lowman, 57 Ark. 160, 20 S. W. 1090; Cincinnati &c. R. Co. v. Evans, 33 Ky. L. 596, 110

petent, a different rule applies.[13] Where a workman engaged in repairing a bridge is injured by a wedge flying out of a piece of timber, the employer is not liable.[14] The authorities require the conclusion that the employe assumes all of the risks of the service in which he voluntarily engages, except such as arise from negligence on the part of the employer, so that in whatever form the question may arise, the general rule must be that risks of the service shall not be increased or caused by the employer's negligence, but risks not increased or caused by the employer's negligence are risks of the service which the employe assumes.[15] The test is not danger but negligence on the part of the employer.[16]

S. W. 844; Davis v. Baltimore &c. R. Co., 152 Pa. St. 314, 25 Atl. 498, 53 Am. & Eng. R. Cas. 372. See also Doss v. Missouri &c. R. Co., 135 Mo. App. 643, 116 S. W. 458.

[13] Cincinnati &c. R. Co. v. Madden, 134 Ind. 462, 34 N. E. 227. The correct basis for the decision in the case cited is that the master was guilty of a negligent breach of duty in employing an incompetent engineer, for had the engineer been competent, risk from his negligence would have been assumed by the plaintiff. If the employe knew of an engineer's incompetency there could be no recovery. Gulf &c. Co. v. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706; Paland v. Chicago &c. R. Co., 44 La. Ann. 1003, 11 So. 707.

[14] Bedford &c. R. Co. v. Brown, 142 Ind. 659, 42 N. E. 359. See Bonnet v. Galveston &c. R. Co., 89 Tex. 72, 33 S. W. 334.

[15] Anglin v. Texas &c. R. Co., 60 Fed. 553; McGrath v. Texas &c. R. Co., 60 Fed. 555; Grand Trunk &c. R. Co. v. Tennant, 66 Fed. 922; Louisville &c. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. 127; Chicago &c. Co. v. Sobkowiak, 45 Ill. App. 317, 148 Ill. 573, 36 N. E. 573; Day v. Cleveland &c. R. Co., 137 Ind. 206, 36 N. E. 854; Diamond &c. Co. v. DeHority, 143 Ind. 381, 40 N. E. 681; Lynch v. Chicago &c. R. Co., 8 Ind. App. 516, 36 N. E. 44; Kerns v. Chicago &c. R. Co., 94 Iowa 121, 62 N. W. 692; Smart v. Louisiana &c. Co., 47 La. Ann. 869, 17 So. 346; Connelly v. Hamilton &c. R. Co., 163 Mass. 156, 39 N. E. 787; McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007; Rutherford v. Chicago &c. R. Co., 57 Minn. 237, 59 N. W. 302; Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546; Bradbury v. Kingston &c. R. Co., 157 Pa. St. 231, 27 Atl. 400; Missouri &c. R. Co. v. Hamilton (Tex. Civ. App.), 30 S. W. 679; Allen v. Logan City, 10 Utah 279, 37 Pac. 496; Craven v. Smith, 89 Wis. 119, 61 N. W. 317; Peterson v. Sherry &c. Co., 90 Wis. 83, 62 N. W. 948.

[16] Phelps v. Chicago &c. Ry. Co., 122 Mich. 171, 81 N. W. 101, 102 (quoting text); Denver &c. R. Co.

§ 1853 (1291). Duty of employe to acquaint himself with employer's business methods.—The general rule is that an employe must exercise ordinary care and diligence to obtain knowledge of the business methods of the employer. Where there are means and opportunities of knowledge of the employer's methods and customs knowledge may usually be presumed. Where there is a duty to know and a negligent failure to perform that duty the employe cannot maintain an action against the employer for the recovery of damages for personal injuries except in very rare and unusual cases.[17] But the employe is not always bound to know of defects because he might have learned the master's method of carrying on the business and have inferred therefrom the existence of the defect.[18]

§ 1854 (1292). Duty of employe in regard to competency of co-employes.—Within reasonable limits an employe has a right to act upon the presumption that the employer has exercised

v. Burchard, 35 Colo. 539, 86 Pac. 749, 753 (also quoting text). See also Duffee v. Boston &c. R. Co., 81 Vt. 52, 69 Atl. 124, 130 Am. St. 1019, 15 Ann. Cas. 1089.

[17] Hewitt v. Flint &c. R. Co., 67 Mich. 61, 34 N. W. 659, 31 Am. & Eng. R. Cas. 249. See generally as to duty of employe to secure knowledge. Bohn Manufacturing Co. v. Erickson, 56 Fed. 943, 946; Northwestern Fuel Co. v. Danielson, 57 Fed. 915; Chicago &c. R. Co. v. Linney, 59 Fed. 45, 47; Johnson v. Oakes, 70 Fed. 566; St. Louis &c. R. Co. v. Davis (Ark.), 141 S. W. 1181; Seininski v. Wilmington &c. Co. (Del.), 83 Atl. 20; Louisville &c. R. Co. v. Corps, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636 and note; Evansville &c. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355; Salem &c. Co. v. Hobbs, 144 Ind. 146, 42 N. E. 1022; Evansville &c. R. Co. v. Henderson, 142 Ind. 596, 42 N. E. 216; Alotsa Coal &c. Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555; Heaney v. Boston El. R. Co., 211 Mass. 467, 98 N. E. 89; Gulf &c. R. Co. v. Wittig (Tex.), 35 S. W. 859.

[18] Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 780, 42 L. ed. 1188. See also Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 26, 48 L. ed. 96; Galveston &c. R. Co. v. Stoy, 44 Tex. Civ. App. 448, 99 S. W. 135. And, of course, the general rule stated is not to be so applied as to conflict with more specific rules already laid down and does not ordinarily require minute inspection or the like on the part of the employe. So, it has been held that there is no affirmative duty on the part of the employe to ascertain rules not made known. St. Louis &c. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W.

reasonable care in selecting and employing competent co-employes,[19] but this right does not extend so far as to dispense with the exercise of reasonable care and diligence on the part of the employe. The duty of the employer is to use ordinary care to select and secure the services of competent co-employes, but the duty does not go so far as to make the employer absolutely answerable for the competency of co-employes. The presumption, therefore, upon which an employe has a right to act is that the employer exercised reasonable care in selecting co-employes, and he cannot absolutely assume that the co-employes are competent. If the injured employe cannot show that the employer did not exercise ordinary care in selecting and securing the services of competent co-employes, or that after he knew or ought to have known of incompetency the employer retained the incompetent person, there can be no recovery upon the ground of negligence in employing fellow-servants.[20] Nor can there be a recovery against the employer

1170, Ann. Cas. 1917A, 563n; Anderson v. Great Northern R. Co., 102 Minn. 355, 113 N. W. 213.

[19] Chicago &c. R. Co. v. Beatty, 13 Ind. App. 604, 40 N. E. 753, citing Indiana &c. R. Co. v. Dailey, 110 Ind. 75, 10 N. E. 631; Lake Shore &c. R. Co. v. Stupak, 108 Ind. 1, 8 N. E. 630; Chicago &c. R. Co. v. Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. 357, and note; Pittsburg R. Co. v. Thomas, 174 Fed. 591. See also Hall v. Bedford &c. Co., 156 Ind. 460, 60 N. E. 149; Chicago &c. R. Co. v. Beatty, 13 Ind. App. 604, 40 N. E. 753; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. 244; Texas &c. R. Co. v. Johnson, 89 Tex. 519, 35 S. W. 1042. Some of the statements in the cases cited from the Indiana Appellate Court reports are, in many respects, very broad, and are opposed to the decisions of the Supreme Court of Indiana. Ohio &c. R. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702. And see cases cited in dissenting opinion in Chicago &c. R. Co. v. Champion, 9 Ind. App. 510, 531, 53 Am. St. 357 and note.

[20] Davis v. Detroit &c. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Moss v. Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126; Huffman v. Chicago &c. R. Co., 78 Mo. 50; Kersey v. Kansas City &c. R. Co., 79 Mo. 362; Baulec v. New York &c. R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Whaalan v. Mad River &c. R. Co., 8 Ohio St. 249; East Tennessee &c. R. Co. v. Gurley, 12 Lea (Tenn.) 46; Campbell v. Wing, 5 Tex. Civ. App. 431, 24 S. W. 360; Tarrant v. Webb, 18 C. B. 797, 86 E. C. L. 797, ante § 1845. See also Pittsburg R. Co. v. Thomas, 174 Fed. 591; Gravelle v. Minneapolis &c. R. Co., 10

in such a case if the employe has knowledge of the incompetency of his fellow-servant and does not exercise the diligence and care which a person of ordinary prudence possessing such knowledge would exercise under like circumstances. It is, indeed, the general rule that where an employe has knowledge of the incompetency of a co-employe and still remains in the employer's service he assumes all risk of injury from the acts of such incompetent co-employe.[21] An employe owes his employer a duty in this regard, for the duty growing out of the contract of service is not solely on the part of the employer. The duty which the employe owes the employer requires that he should not pass unnoticed and without objection the incompetency of the co-employes in cases where he has knowledge

Fed. 711; Kansas &c. Co. v. Brownlee, 60 Ark. 582, 31 S. W. 453; Blake v. Maine Cent. R. Co., 70 Maine 60, 35 Am. Rep. 297; Norfolk &c. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710 and note, 47 Am. St. 392; Lee v. Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909; Cameron v. New York Cent. R. Co., 145 N. Y. 400, 40 N. E. 1. But see as to when he is chargeable with notice, Baltimore &c. R. Co. v. Henthorne, 73 Fed. 634; Wabash R. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. ed. 605; Texas &c. R. Co. v. Johnson, 89 Tex. 519, 35 S. W. 1042; Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176; Gilman v. Eastern R. Co., 10 Allen (Mass.) 233, 87 Am. Dec. 635.

[21] Hayden v. Smithville Manufacturing Co., 29 Conn. 548; Richmond &c. R. Co. v. Worley, 92 Ga. 84, 18 S. E. 361; United States &c. Co. v. Wilder, 116 Ill. 100, 5 N. E. 92; St. Louis &c. Co. v. Kenyon, 57 Ill. App. 640; Indianapolis &c. Transit Co. v. Foreman, 162 Ind. 85, 93, 69 N. E. 669, 102 Am. St. 185, citing other Indiana cases; Kroy v. Chicago &c. R. Co., 32 Iowa 357; McQueen v. Central &c. R. Co., 30 Kans. 689, 1 Pac. 139; Jackson v. Kansas City &c. R. Co., 31 Kans. 761, 3 Pac. 501; Kansas Pac. R. Co. v. Peavey, 34 Kans. 472; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Laning v. New York &c. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Lake Shore &c. R. Co. v. Knittal, 33 Ohio St. 468; Consolidated &c. Co. v. Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848 and note; Gulf &c. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706; McCharles v. Horn &c. Co., 10 Utah 470, 37 Pac. 733; Latremouille v. Bennington &c. R. Co., 63 Vt. 336, 22 Atl. 656; Assop v. Yates, 2 H. & N. 768; Bassett v. Norwich &c. R. Co., 9 Law Reporter (N. S.) 551; Skip v. Eastern &c. R. Co., 24 Eng. L. & Eq. R. 396. See Long v. Coronado &c. R. Co., 96 Cal. 269, 31 Pac. 170; Williams v. Missouri Pac. R.

of such incompetency.[22] In cases where the employer is a railroad company charged with the duty of carrying persons and property and where great care is exacted of the company it has been said that public policy demands of employes that they themselves should exercise reasonable care to ascertain the competency of co-employes, and, if they discover that such co-employes are incompetent, use reasonable care and diligence to make it known to the employer.[23]

§ 1855 (1293). Employe bound to use ordinary care to remedy defects.—It would seem that an employe who can readily and easily remedy a defect discovered by him in an appliance with which he is working ought to do so. He is not bound to exercise more than ordinary care, but that degree of care it is his duty to exercise. He must, in some instances, in order to successfully insist that the master has not performed his

Co., 109 Mo. 475, 18 S. W. 1098; Mexican &c. R. Co. v. Jackson (Tex. Civ. App.), 32 S. W. 230. But compare Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. ed. 296. The principle is the same as that which rules in cases where employes have knowledge of defects in appliances, and in such cases it is settled that, ordinarily, knowledge will defeat a recovery by the employe. Victor &c. Co. v. Muir, 20 Colo. 320, 38 Pac. 378, 26 L. R. A. 435, 46 Am. St. 299; Breckenridge &c. Co. v. Hicks, 94 Ky. 362, 42 Am. St. 361; Harker v. Burlington &c. R. Co., 88 Iowa 409, 55 N. W. 316, 45 Am. St. 242; Titus v. Bradford &c. R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. 944; Taylor &c. R. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. 316. The doctrine of assumption of risks by the employe is elsewhere considered, and the cases there cited show the effect of knowledge.

[22] St. Louis &c. Co. v. Kenyon, 57 Ill. App. 640; citing Indianapolis &c. R. Co. v. Carr, 35 Ind. 510; Baltimore &c. R. Co. v. State, 33 Md. 542; Hunt v. Lowell &c. Co., 1 Allen (Mass.) 343; Brothers v. Cartter, 52 Mo. 372; McCharles v. Horn &c. Co., 10 Utah 470, 37 Pac. 733; 4 Thomp. Neg. (2d ed.) § 4712. In Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104, it is held that the employe is not bound to report matters of which the employer has knowledge. It is to be said of the case just cited that it is an extreme one upon several points and can not be regarded as sound upon some of the points decided. Truman v. Rudolph, 22 Ont. App. 250.

[23] Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395.

duty, affirmatively show that he has taken reasonable measures to remedy defects which are known to him, or that he has made a report and thus taken steps to have them remedied. The failure to take such measures is ordinarily regarded as contributory negligence, but we are inclined to think that it may be justly held that where the defect is a temporary one, easily remedied, the company cannot be regarded as guilty of negligence from the mere fact that such an appliance is furnished the employe.[24] Cases illustrating this doctrine are the so-called "simple tool" cases and the like,[25] and there are, of course, cases in which the servant is employed to repair, and in still others the duty of some inspection or repair may be cast upon him by rule or agreement express or implied.[26]

§ 1856 (1294). Duty of employe to acquaint himself with rules of employer.—The weight of authority, so far as the number of decisions can be regarded as constituting the weight, is that the employer in order to make a rule available must affirmatively show that it was brought to the employe's knowledge.[27] There is, however, conflict upon this question, for well-

[24] Meador v. Lake Shore &c. R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. 384. See also Tobler v. Pioneer &c. Co., 166 Ala. 482, 52 So. 86; Roth v. Buetell Bros. Co., 142 Iowa 212, 119 N. W. 166; White v. Thomasville Light &c. Co., 151 N. Car. 356, 66 S. E. 210.

[25] See ante, § 1837; also Denver &c. R. Co. v. Sporleder, 39 Colo. 142, 89 Pac. 55; and note in 40 L. R. A. (N. S.) 832.

[26] See Memphis &c. R. Co. v. Graham, 94 Ala. 545, 10 So. 283; Tennessee Coal &c. Co. v. King, 161 Ala. 345, 50 So. 75; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Chicago &c. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688; Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628; Conway v. Chicago &c. R. Co., 103 Iowa 373, 72 N. W. 543; White v. Thomasville Light &c. Co., 141 N. Car. 356, 66 S. E. 210; McPherson v. Great Northern R. Co., 140 Wis. 473, 122 N. W. 1022.

[27] Carroll v. East Tennessee &c. R. Co., 82 Ga. 452; Central &c. R. Co. v. Ryles, 84 Ga. 420, 11 S. E. 499; Louisville &c. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; Conners v. Burlington &c. R. Co., 87 Iowa 147, 53 N. W. 1092; Atchison &c. R. Co. v. Plunkett, 25 Kans. 188; Covey v. Hannibal &c. R. Co., 27 Mo. App. 170; LaCroy v. New York &c. R. Co., 57 Hun 67, 10 N. Y. S. 382. See also Indiana &c. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175; Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252, 25

reasoned cases affirm that it is the duty of the employe to acquaint himself with the rules established by the employer.[28] Our opinion is that the true doctrine is that the employe is under a duty to exercise ordinary care to ascertain the rules of the service in which he engages, where they are properly promulgated and he is given an opportunity to learn them. It is settled law that it is the duty of the employer to promulgate rules, and, this being true, it is the reciprocal duty of the employe to ascertain what those rules are, for he is bound to know what the law requires of the employer, and hence is put upon inquiry, and, according to elementary principles, is chargeable with a knowledge of the facts to which a reasonable inquiry would lead. The employe has, indeed, a right to rely upon the employer's using ordinary care and diligence to enforce the rules, and surely the employe ought to be held bound to make a reasonably diligent effort to ascertain the nature of the rules of the service. It is the employe's duty to exercise ordinary care to obtain knowledge of the employer's business methods, at least in a general way, and the most important element of that duty is to ascertain what rules the employer has adopted for the conduct and control of his business. If the employe does not know what the rules are it is difficult to understand how he can have a right to rely on them, and it is not less difficult to understand why the duty as to rules is unilateral and not mutual. At all events where

Am. St. 47; St. Louis &c. R. Co. v. Puckett, 88 Ark. 204, 114 S. W. 224; St. Louis &c. R. Co. v. Blaylock, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563n; McDermott v. Iowa Falls &c. R. Co., 85 Iowa 180, 52 N. W. 181, 10 S. E. 163, 6 L. R. A. 214 and note; Anderson v. Great Northern R. Co., 102 Minn. 355, 113 N. W. 913; Adams v. Gulf &c. R. Co. (Tex. Civ. App.), 105 S. W. 526.

[28] Atoka Coal &c. Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555; Alexander v. Louisville &c. R. Co., 83 Ky. 589; Wilson v. Michigan &c. R. Co., 94 Mich. 20, 53 N. W. 797; Agawam Bank v. Strever, 18 N. Y. 502; Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627; LaCroy v. New York &c. R. Co., 132 N. Y. 570, 30 N. E. 391; Pilkinton v. Gulf &c. R. Co., 70 Tex. 226, 7 S. W. 805. See Helm v. Louisville &c. R. Co., 17 Ky. L. 1004, 33 S. W. 396; Central &c. R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418; Parker v. Georgia &c. R. Co., 83 Ga. 539, 10 S. E. 233. At least if the employer furnished him

his attention is called to the fact that there are such rules properly promulgated and accessible, governing his duties, he ought to be chargeable with knowledge of them. It seems quite clear to us, we say with all deference to the courts that hold a different doctrine, that the employe is bound to know that it is the employer's duty, in the case of an intricate business like that of railroading, to adopt rules, and, knowing that, he is bound to make a reasonably careful and diligent inquiry to ascertain what rules have been adopted. The employer cannot, as we think, successfully insist that the employe must inform himself as to the rules unless the employer uses reasonable care to make the rules readily accessible to the employe, but if they are readily accessible the employe should, ordinarily, be charged with knowledge of them.[29] It is held that where there is a conflict of evidence as to whether the employe had knowledge of the rules the question is one of fact for the jury.[30]

§ 1857 (1295). **Promise to repair.**—The general rule is that where the employer promises the employe to remedy a defect in the machinery or appliances, or to make safe an unsafe working place, the employe is not in fault in relying upon the promise and continuing in the service for a reasonable length

an opportunity to learn the rules and he could have done so by the use of ordinary care. Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. 104.

[29] Shenandoah &c. R. Co. v. Lucado, 86 Va. 390, 21 S. E. 422; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Alcorn v. Chicago &c. R. Co., 108 Mo. 81, 16 S. W. 229; Norfolk &c. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522. See also Louisville &c. R. Co. v. Bowcock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262; Foley v. Boston &c. R. Co., 198 Mass. 532, 84 N. E. 846; LaCroy v. New York &c. R. Co., 132 N. Y. 570, 30 N. E. 391; Worcester v. Galveston &c. R. Co. (Tex. Civ. App.), 91 S. W. 339. Where there is no publication of the rule the employe is not affected by it, unless he had actual knowledge of its existence and contents. Fay v. Minneapolis &c. R. Co., 30 Minn. 231, 15 N. W. 241.

[30] Louisville &c. R. Co. v. Watson, 90 Ala. 68, 8 So. 249. See Wooden v. Western &c. R. Co., 43 N. Y. St. 218, 18 N. Y. S. 768; Byrnes v. New York &c. R. Co., 71 Hun 209, 24 N. Y. S. 517.

of time, although he has full knowledge of defects.[31] We suppose, however, that if the danger from the defects is so great and so clearly apparent that no reasonable person would incur it, the employe who knowingly and voluntarily incurs it after time for deliberation cannot recover for injuries he may sustain because of such defects,[32] and most of the decisions cited in support of the last preceding proposition add this qualification. A distinction is also made by many of the courts between cases where the implement or tool is one of which an ordinary person may have full knowledge and the use of which requires no peculiar skill or care and cases where the appliances are

[31] New Jersey &c. R. Co. v. Young, 49 Fed. 723; Gowen v. Harley, 56 Fed. 973; Homestake &c. Co. v. Fullerton, 69 Fed. 923, citing Hough v. Railway Co., 100 U. S. 213, 25 L. ed. 612; Indianapolis &c. R. Co. v. Watson, 114 Ind. 20, 14 N. E. 721, 5 Am. St. 578; Greenleaf v. Dubuque &c. R. Co., 33 Iowa 52; Greene v. Minneapolis &c. R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785; Rothenberger v. Northwestern &c. Milling Co., 57 Minn. 461, 59 N. W. 531; Laning v. New York &c. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. 806; Clarke v. Holmes, 7 Hurl. & N. 937. See also to same effect, St. Louis &c. R. Co. v. Phillips, 165 Ala. 504, 51 So. 638; Cincinnati &c. R. Co. v. Robertson, 139 Fed. 519; Crosby v. Cuba R. Co., 158 Fed. 144; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714; Illinois Cent. R. Co. v. North, 97 Ill. App. 124; McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465; Kroy v. Chicago &c. R. Co., 32 Iowa 357; Lupher v. Atchison &c. R. Co., 86 Kans. 712, 122 Pac. 106, Ann. Cas. 1913C, 498 n.; Lyttle v. Chicago &c. R. Co., 84 Mich. 289, 47 N. W. 571; LeClair v. First Div. &c. R. Co., 20 Minn. 9; Conroy v. Vulcan Iron Works, 62 Mo. 35; Burch v. Southern Pac. R. Co., 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166 n., and note and cases cited; Taylor v. Nevada &c. R. Co., 26 Nev. 415, 69 Pac. 858, 859; Boney v. Atlantic &c. R. Co., 145 N. Car. 248, 58 S. E. 1082; Manufacturing Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Corcoran v. Milwaukee &c. R. Co., 81 Wis. 191, 51 N. W. 328.

[32] 4 Thomp. Neg. (2d ed.) § 4667; White's Supp. §§ 4666, 4667; Comer v. Meyer, 78 N. J. L. 464, 74 Atl. 497, 29 L. R. A. (N. S.) 597 n, and cases cited in note. See also Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, 7, Ann. Cas. 1915B, 475.

such as require peculiar skill and care in their use.[33] The cases affirm that, in order to make the employer liable, there must be a promise and the employe must have relied upon it.[34] But it is not necessary that a definite time for making the repairs be fixed, as a reasonable time will be implied if no time is expressly fixed, and what is a reasonable time is usually for the jury.[35]

§ 1858 (1296.) Brakeman—Assumption of risks by.—A person who accepts service as a brakeman on a railroad train assumes the ordinary risks of the service into which he enters.

[33] Stirling Coal &c. Co. v. Fork, 141 Ky. 40, 131 S. W. 1030, 40 L. R. A. (N. S.) 837; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; McGill v. Cleveland &c. Trac. Co., 79 Ohio St. 203, 86 N. E. 989, 19 L. R. A. (N. S.) 793, 128 Am. St. 705; Corcoran v. Milwaukee &c. R. Co., 81 Wis. 191, 51 N. W. 328; Gowen v. Harley, 56 Fed. 973, 982. See ante, § 1837. In the case last cited it was said, speaking of the rule that a promise to repair relieves the employe, that: "It has no application to a case where the service required is simple manual labor, without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with reasonable safety." Citing among other cases, Tuttle v. Detroit G. H. & R. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. ed. 1114; Richards v. Rough, 53 Mich. 212, 216, 18 N. W. 785. But compare Brouseau v. Kellogg &c. Co., 158 Mich. 312, 122 N. W. 620, 27 L. R. A. (N. S.) 1052 n; and note where the conflicting authorities on both sides are reviewed and the doctrine of the principle case that a promise to repair relieves the employe, even if the tool is a simple one, is approved.

[34] Sweeney v. Berlin &c. R. Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722, and note; Anderson v. Van Riper, 128 N. Y. S. 66; Eureka Co. v. Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152; Daugherty v. Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844; Atchison &c. R. Co. v. Midgett, 1 Kans. App. 138, 74 Pac. 995. See generally Prentiss v. Kent &c. R. Co., 63 Mich. 478, 30 N. W. 109; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Manufacturing Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Waterman v. Skokomish Timber Co., 65 Wash. 234, 118 Pac. 36. But it is held that it need not be in direct words. Nash v. Dowling, 93 Mo. App. 156; Detroit Crude Oil Co. v. Grable, 94 Fed. 73; Gulf &c. R. Co. v. Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. 377.

[35] Cincinnati &c. R. Co. v. Robertson, 139 Fed. 519; Burch v. Southern Pac. Co., 140 Fed. 270; Swift &c. Co. v. Madden, 165 Ill. 41, 45 N. E. 979; Daugherty v. Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844. But see McPeck v. Central Vt. R. Co., 79 Fed. 591.

He does not, ordinarily, assume extraordinary risks unless he has knowledge of them and after knowledge continues in the service of the company. The general rule governing the assumption of risks apply to brakemen on railroad trains and in this place we shall not restate those rules, but will refer to cases illustrating their application. Where a brakeman has knowledge of the location and existence of a cattle-guard, it has been held that danger arising from it is assumed as a risk of the service.[36] It is also held that where a brakeman has knowledge that a track has not been ballasted and he voluntarily continues in the service after acquiring such knowledge he cannot recover for injuries caused by a failure to ballast the track.[37] So, in a recent case, where a brakeman knew and was accustomed to the road, and it and all others in the same region used open culverts, the risk of falling through a culvert while cutting cars at night was held to be a risk assumed by him.[38]

[36] Peoria &c. R. Co. v. Puckett, 52 Ill. App. 222; McKee v. Chicago &c. R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817. See generally Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771; Mobile &c. R. Co. v. Vallone, 214 Ill. 124, 73 N. E. 416; Lovejoy &c. R. Co. v. Boston &c. R., 125 Mass. 79, 28 Am. Rep. 206; Sullivan v. Fitchburg &c. R. Co., 161 Mass. 125, 36 N. E. 751; Content v. New York &c. R. Co., 165 Mass. 267, 43 N. E. 941; Cole v. Rome &c. R. Co., 72 Hun (N. Y.) 467, 25 N. Y. S. 276; Rock v. Retsoff &c. Co., 15 N. Y. S. 872; Missouri Pac. R. Co. v. Somers, 71 Tex. 700, 9 S. W. 741. See San Antonio &c. R. Co. v. Parr (Tex. Civ. App.), 26 S. W. 861. The general rule asserted by the weight of authority is that a brakeman assumes risks from dangers of the service open to observation. Howey v. Lake Shore &c. R. Co., 13 Misc. (N. Y.) 641, 34 N. Y. S. 1089; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Lynch v. Chicago &c. R. Co., 8 Ind. App. 516, 36 N. E. 44; Indianapolis &c. R. Co. v. Ott, 11 Ind. App. 564, 35 N. E. 517; Manning v. Chicago &c. R. Co., 105 Mich. 260, 63 N. W. 312; McDugan v. New York &c. R. Co., 31 N. Y. S. 135; Albert v. New York &c. R. Co., 80 Hun 152, 29 N. Y. S. 1126; Burnell v. West Side &c. R. Co., 87 Wis. 387, 58 N. W. 772.

[37] O'Neal v. Chicago &c. R. Co., 132 Ind. 110, 31 N. E. 669. See also Finnell v. Delaware &c. R. Co., 129 N. Y. 669, 42 N. Y. St. 354, 29 N. E. 825; ante § 1829, et seq.: Pennsylvania Co. v. Hankey, 93 Ill. 580.

[38] Southern R. Co. v. Gloyd, 138 Fed. 388. See also Miller v. Detroit &c. R. Co., 133 Mich. 564, 95 N. W. 718; ante §§ 1829, 1831.

The rule that where an employe without objection continues in the service after he has full knowledge of danger applies to brakemen as well as the other employes.[39] Thus where a brakeman knows that it is the custom of the engineers to leave the engine in charge of firemen when switching is done, he is presumed to assume the risk arising from that method of conducting business, unless he proves that the fireman was incompetent and his incompetency was known to the employer.[40] The rule that where defects are known to the employe it is his duty to give notice or make complaint to the employer applies to brakemen as well as to other employes[41] engaged in running or making up trains.[42] In accordance with the general rule,

[39] Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Little Rock R. Co. v. Moseley, 56 Fed. 1009, 1012; Southern &c. R. Co. v. Drake, 53 Kans. 1, 35 Pac. 825; Atchison R. Co. v. Schroeder, 47 Kans. 315, 27 Pac. 965; Wabash R. Co. v. Ray, 152 Ind. 392, 51 N. E. 920.

[40] Louisville &c. R. Co. v. Kelly, 63 Fed. 407. It was said by Woods, J., that: "Railroad companies are certainly not required to employ skilled engineers as firemen, and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen, and when the fact of unfitness was known, or ought reasonably to have been known, to the master mechanic, or other like representative, of the company." This ruling is in harmony with the general rule that an employe assumes the risks of the master's business methods. Ante, §§ 1853, 1856. See also Chicago &c. R. Co. v. Voelker, 129 Fed. 522, 70 L. R. A. 264. But compare Chicago &c. R. Co. v. White, 209 Ill. 124, 70 N. E. 588.

[41] Southern &c. R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. ed. 391; Galveston &c. R. Co. v. Eckols, 7 Tex. Civ. App. 429, 26 S. W. 1117; Richmond &c. R. Co. v. Worley, 92 Ga. 84, 8 S. E. 361; South Florida &c. R. Co. v. Weese, 32 Fla. 212, 13 So. 436. See Nicholaus v. Chicago &c. R. Co., 90 Iowa 85, 57 N. W. 694.

[42] The duty to make complaint rests upon employes generally. Coal and Mining Co. v. Clay, 51 Ohio 542, 38 N. E. 610, 25 L. R. A. 848; Goodridge v. Washington &c. Co., 160 Mass. 234, 35 N. E. 484; Cunningham v. Merrimac &c. Co., 163 Mass. 89, 39 N. E. 774; Jungnitsch v. Michigan &c. R. Co., 105 Mich. 270, 63 N. W. 296; Kaare v.

it has been held that one who undertakes to couple cars, with knowledge of the fact that the train is not manned by a sufficient crew, assumes the risks.[43] And so where an experienced brakeman in violation of a rule of the company unnecessarily goes between moving cars.[44] As upon many other questions the authorities are in conflict upon the question whether brakemen assume the risks of injury from the sudden starting or jerking of trains.[45] We can see no substantial reason why the risk from this cause, at least from the ordinary jolting or jerking of a train, should not generally be regarded as an ordinary risk of the service. As elsewhere shown, it is the duty of the

Troy &c. Co., 139 N. Y. 369, 34 N. E. 901; Coal and Car Co. v. Norman, 49 Ohio St. 598; Lineoski v. Susquehanna &c. Co., 157 Pa. St. 153, 27 Atl. 577; McCharles v. Horn &c. Co., 10 Utah 470, 37 Pac. 733; ante, § 1854. But see Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958. Where the employer knows of the defect it is not, under the statutory rule in some jurisdictions, incumbent on the employe to make complaint. Truman v. Rudolph, 22 Ont. App. 250.

[43] Richmond &c. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290. See 4 Thomp. Neg. §§ 4767, 4768.

[44] Moore v. St. Louis &c. R. Co., 115 La. Ann. 86, 38 So. 913. This would ordinarily seem to be contributory negligence. See also Huggins v. Southern R. Co., 148 Ala. 153, 41 So. 856; Whalin v. Illinois Cent. R. Co., 212 Ill. App. 428. But see Pierson v. Chicago &c. R. Co., 127 Iowa 13, 102 N. W. 149.

[45] Davis v. Baltimore &c. R. Co., 152 Pa. St. 314, 25 Atl. 498, 53 Am. & Eng. R. Cas. 372; Rutledge v. Missouri &c. R. Co., 110 Mo. 312, 11 S. W. 38; Kansas City &c. R. Co. v. Murray, 55 Kans. 336, 40 Pac. 646; Louisville &c. R. Co. v. Woods, 105 Ala. 561, 17 So. 41. In Louisville &c. R. Co. v. Strangis, Admx., 156 Ky. 439, 161 S. W. 239, it is held that brakemen assume the risk of usual and ordinary jerks, but not of unusual, unnecessary and extraordinary ones. See also and compare Central Ky. Tract. Co. v. Smedley, 150 Ky. 598, 150 S. W. 658, Ann. Cas. 1914D, 441n; Louisville &c. R. Co. v. Greenwell's Admr., 144 Ky. 796, 139 S. W. 934. Where the brakeman has a right to assume the contrary and the negligence is that of a vice-principal or one for whose negligence the statute makes the company responsible the brakeman does not necessarily assume the risk. Strong v. Iowa &c. R. Co., 94 Iowa 380, 62 N. W. 799; Kansas City &c. R. Co. v. Murray, 55 Kans. 336, 40 Pac. 646; Missouri &c. R. Co. v. Crane, 13 Tex. Civ. App. 126, 35 S. W. 797. See also Pittsburgh &c. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Bowes v. New York &c. R. Co., 181 Mass. 89, 62 N. E. 949; St. Louis &c. R. Co. v. Pope, 43 Tex. Civ. App. 616, 97 S. W.

railroad company to use ordinary care to keep its road-bed and track in a reasonably safe condition, and this duty is owing to brakemen as well as to other trainmen, but even if defects do exist and do cause an injury the company is not liable unless it is affirmatively shown that it was guilty of negligence.[46] And a brakeman on a construction train, knowing that the road is not completed, assumes the risks incident thereto.[47] Where brakemen are required to get on and off trains at stations it is the duty of the company to exercise ordinary care to keep platforms in a reasonably safe condition, and risks from defective platforms are not assumed unless the defects are known to the employe.[48] Many other illustrative cases showing risks assumed are cited below.[49] But it is held in a recent case that a brakeman, who had been employed but a few days and had passed over a certain trestle but six times, usually in the

534; Canada &c. R. Co. v. Hurdman, 25 Can. S. C. 205. For other decisions respecting liability to brakemen, see Fordyce v. Culver, 2 Tex. Civ. App. 569, 22 S. W. 237; Chesapeake &c. Ry. Co. v. Proffitt, 218 Fed. 23; Peoria &c. R. Co. v. Puckett, 42 Ill. App. 642; Kansas City &c. R. Co. v. Murray, 55 Kans. 336, 40 Pac. 646; Carey v. Boston &c. R. Co., 158 Mass. 228, 33 N. E. 512; Irvine v. Flint &c. R. Co., 89 Mich. 416, 50 N. W. 1008; Ashman v. Flint &c. R. Co., 90 Mich. 567, 51 N. W. 645; Knox v. New York &c. R. Co., 69 Hun 93, 23 N. Y. S. 198; McNeil v. New York &c. R. Co., 71 Hun 24, 24 N. Y. S. 616.

[46] McGowan v. Chicago &c. R. Co., 91 Wis. 147, 64 N. W. 891.

[47] Baltimore &c. R. Co. v. Welsh, 17 Ind. App. 505, 47 N. E. 182. See also Evansville &c. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Manning v. Chicago &c. R. Co., 105 Mich. 260, 63 N. W. 312; Laughy v. Bird &c. Lumber Co., 136 Wis. 301, 117 N. W. 796. But compare Gulf &c. R. Co. v. Redeker, 67 Tex. 181, 2 S. W. 513.

[48] Brown v. Ohio River &c. R. Co., 138 Ind. 648, 37 N. E. R. 717. But an employe may be held to have assumed the risk of the slippery condition of a car platform. Adkins v. Atlanta &c. R. Co., 27 S. Car. 71, 2 S. E. 849. See also to effect that risk of slippery platform is assumed, Sellers v. Chicago &c. R. Co., 87 Nebr. 322, 127 N. W. 125.

[49] Draw bar too low and other defects therein: Karrer v. Detroit &c. R. Co., 76 Mich. 400, 43 N. W. 370; Secord v. Chicago &c. R. Co., 107 Mich. 540, 65 N. W. 550; Atchison &c. R. Co. v. Wagner, 33 Kans. 660, 7 Pac. 204; Houston &c. R. Co. v. Barrager (Tex.), 14 S. W. 242. Cars of unequal heights or the like: St. Louis &c. R. Co. v. Higgins, 44 Ark. 293; Botsford v. Mich. Cent. R. Co., 33 Mich. 256;

night, and who was not shown to have had any knowledge of the condition about such trestle, did not assume the risk arising from combustible material allowed to accumulate about the trestle, and which became ignited and set fire to the trestle.[50]

§ 1859 (1296a). **Couplers, bumpers and brakes.**—There is some conflict of opinion as to how far the duty of the employer extends in the matter of keeping couplers, bumpers, and the like, in a reasonably safe condition for use. There is, however, little or no conflict as to the duty of the employer to exercise reasonable care to provide reasonably safe couplings and bumpers and to keep them in a reasonably safe condition for use by brakemen and other employes whose duty it is to couple cars, nor is there substantial or well-founded disagreement as to the rule, that brakemen assume the risks of defects in such appliances where they have knowledge of the defects.[51] We can see no reason why the general rules do not apply in full

Williams v. Central R. Co., 43 Iowa 396; Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22, 45 N. E. 76, 1121; Woodworth v. St. Paul &c. R. Co., 18 Fed. 282. Projecting loads: Ely v. San Antonio &c. R. Co., 15 Tex. Civ. App. 511, 40 S. W. 174; Brice v. Louisville &c. R. Co., 10 Ky. L. 526, 9 S. W. 288; Day v. Toledo &c. R. Co., 42 Mich. 523, 4 N. W. 203; McIntosh v. Missouri Pac. R. Co., 58 Mo. App. 281; Northern Cent. R. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690; Scott v. Oregon R. Co., 14 Ore. 211, 13 Pac. 98. See as to negligence of the company in regard to hand holds, grab irons, and ladders on cars, and assumption of risks or contributory negligence, Dooner v. Delaware &c. R. Co., 171 Pa. St. 581, 33 Atl. 415; Wilson v. New York &c. R. Co., 222 Pa. St. 341, 71 Atl. 183; Kane v. Northern Cent. R. Co., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. ed. 339; Chicago &c. R. Co. v. Barr, 204 Ill. 163, 68 N. E. 543; Bell v. New York &c. R. Co., 168 Mass. 443, 47 N. E. 119; Settle v. St. Louis &c. R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. 633; Gulf &c. R. Co. v. Williams, 72 Tex. 159, 12 S. W. 172; Galveston &c. R. Co. v. Perry, 36 Tex. Civ. App. 414, 82 S. W. 343; Missouri &c. R. Co. v. Hawley, 58 Tex. Civ. App. 143, 123 S. W. 726.

[50] Root v. Kansas City Southern R. Co., 195 Mo. 340, 92 S. W. 621, 6 L. R. A. (N. S.) 212.

[51] Northern &c. R. Co. v. Blake, 63 Fed. 45; Van Winkle v. Chicago &c. R. Co., 93 Iowa 509, 61 N. W. 929; Goodes v. Boston &c. R. Co., 162 Mass. 287, 38 N. E. 500. See Illinois &c. R. Co. v. Harris, 53 Ill. App. 592; Louisville &c. R. Co. v. Stanfill, 32 Ky. L. 1043, 107 S.

force and vigor to such cases. There may possibly be cases to which the general rules do not apply,[52] but they are very rare and of a peculiar and exceptional character. There is much conflict as to the application of the general rules to bumpers and couplings of cars and as to how far the master's duty to brakemen in respect to such appliances extends. So far as we have discovered, no well-reasoned case denies the general rule as to the degree of care required of the employer in regard to the appliances, nor the general rule respecting the assumption of the risks of service by employes. Some of the cases, however, while not in terms denying the general rules, extend the obligation of the employer beyond just limits and erroneously limit the rule regarding the assumption of risks. We cannot undertake to comment upon the cases, nor, indeed, to enter into a full discussion of the subject. We refer to some of the very great number of cases upon the subject[53] and leave the subject

W. 721; Missouri &c. R. Co. v. Baxter, 42 Nebr. 793, 60 N. W. 1044; Bennett v. Greenwich &c. R. Co., 84 Hun 216, 32 N. Y. S. 457; Lucco v. New York &c. R. Co., 87 Hun 612, 34 N. Y. S. 277; Shadd v. Georgia &c. R. Co., 116 N. Car. 968, 21 S. E. 554; Truman v. Rudolph, 22 Ont. App. 250. Or where he is employed to handle "crippled" cars, Yeaton v. Boston &c. R. Co., 135 Mass. 418; Kelley v. Chicago &c. R. Co., 35 Minn. 490, 29 N. W. 173; Arnold v. Delaware &c. Co., 125 N. Y. 15, 25 N. E. 1064; Flannagan v. Chicago &c. R. Co., 50 Wis. 462, 7 N. W. 337; Watson v. Houston &c. R. Co., 58 Tex. 434. See also Marshall v. St. Louis &c. R. Co., 78 Ark. 213, 94 S. W. 56, 115 Am. St. 27, 8 Ann. Cas. 420; Brasel v. Oregon R. & N. Co., 54 Ore. 157, 102 Pac. 726, 26 L. R. A. (N. S.) 331n.

[52] Strong v. Iowa &c. R. Co., 94 Iowa 380, 62 N. W. 799. See also Bryce v. Burlington &c. Ry. Co., 128 Iowa 483, 104 N. W. 483. In Baltimore &c. R. Co. v. Leathers, 12 Ind. App. 544, 40 N. E. 1094, it was held that the question was for the jury where an exigency suddenly called a brakeman to the brakes and he did not know and his attention was so diverted that he may not have seen that the brake staff and wheel projected near the center of the running board. See also Youngblood v. South Carolina &c. R. Co., 60 S. Car. 9, 38 S. E. 232, 85 Am. St. 824 and note.

[53] Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150; St. Louis &c. R. Co. v. Higgins, 44 Ark. 293; Denver &c. R. Co. v. Simpson, 16 Colo. 55, 26 Pac. 339, 25 Am. St. 242; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Toledo &c. R. Co. v. Asbury, 84 Ill. 429; Toledo &c. R. Co. v. Black, 88 Ill. 112; Lake Erie &c. R. Co. v. Ev-

with the statement that in our opinion the employer's duty is to use ordinary care in providing reasonably safe bumpers and coupling appliances, and in keeping them in a reasonably safe condition and that the general rules as to the assumption of risks, the effect of knowledge on the part of the employe, the knowledge or absence of knowledge on the part of the employer, and the failure of the employe to make complaint apply to such appliances as bumpers and couplings.[54] We may say in passing

erett, 86 Ind. 229, 11 Am. & Eng. R. Cas. 221; Pennsylvania Co. v. Long, 94 Ind. 250; Muldowney v. Illinois &c. R. Co., 36 Iowa 462; Williams v. Central R. Co., 43 Iowa 396; Louisville &c. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866; Lawless v. Connecticut &c. R. Co., 136 Mass. 1; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Brewer v. Flint &c. R. Co., 56 Mich. 620, 23 N. W. 440; LeClair v. First Div. &c. R. Co., 20 Minn. 9; Russell v. Minneapolis &c. R. Co., 32 Minn. 230, 20 N. W. 147; Hatter v. Illinois &c. R. Co., 69 Miss. 642, 13 So. 827; Hulett v. St. Louis &c. R. Co., 67 Mo. 239; Ellis v. New York &c. R. Co., 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641; Donohue v. Brooklyn &c. R. Co., 14 N. Y. S. 639; Welch v. New York &c. R. Co., 17 N. Y. S. 342, 63 Hun 625; Crutchfield v. Richmond Railway Co., 78 N. Car. 300; Mason v. Richmond &c. R. Co., 111 N. Car. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. 814, 53 Am. & Eng. R. Cas. 183; Hawk v. Pennsylvania R. Co. (Pa. St.), 11 Atl. 459; Houston &c. R. Co. v. Barrager (Tex.), 14 S. W. 242; Fordyce v. Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421; Whitwam v. Wisconsin &c. Ry. Co., 58 Wis. 408, 17 N. W. 124; Goltz v. Milwaukee &c. R. Co., 76 Wis. 136, 44 N. W. 752. See Browne v. New York &c. R. Co., 158 Mass. 247, 33 N. E. 650; Brooks v. Northern Pac. R. Co., 47 Fed. 687; East Tennessee &c. R. Co. v. Turvaville, 97 Ala. 122, 12 So. 63; Louisville &c. R. Co. v. Law, 14 Ky. L. 850, 21 S. W. 648; Day v. Toledo &c. R. Co., 42 Mich. 523, 4 N. W. 203; Hathaway v. Michigan &c. R. Co., 51 Mich. 253, 47 Am. Rep. 569; McLaren v. Williston, 48 Minn. 299, 51 N. W. 373; Illinois &c. R. Co. v. Bowles, 71 Miss. 994, 1003, 15 So. 138; Gibson v. Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Muirhead v. Hannibal &c. R. Co., 103 Mo. 251, 15 S. W. 530; Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408, 13 L. R. A. 465; Sabine &c. R. Co. v. Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700. See also Morris v. Duluth &c. R. Co., 108 Fed. 747; Gilbert v. Burlington &c. R. Co., 128 Fed. 529.

[54] It is settled law that an employe assumes the risks of the customs and methods of business and the hazards incident to it (ante, § 1854), and it seems to us that he must be held to know that couplings are different, cars are of unequal height and the like, and to

that we do not here speak of the distinction made by many of the authorities between foreign cars and cars owned by the employer. The employer owes to brakemen on its trains the duty of exercising ordinary care in providing and keeping in a reasonably safe condition brakes and similar appliances, but the rule as to the assumption of risks, knowledge of defects, and like general rules apply, where not affected by statute, to brakes and similar appliances with which trains are equipped, and with which brakemen are required to work.[55] The mere fact that a brake is defective or out of repair is not in itself

contract with reference to such matters. If, as is well settled, an employer is not bound to discard machinery and appliances, the employe must be held to enter service knowing this, and hence to impliedly agree that difference in cars, couplers and similar equipment exist and that dangers therefrom are incident to railroad service. See Northern Pac. R. Co. v. Blake, 63 Fed. 45; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. ed. 150; Louisville &c. R. Co. v. Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260; Southern R. Co. v. Arnold, 114 Ala. 183, 21 So. 954; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Van Winkle v. Chicago &c. R. Co., 93 Iowa 509, 61 N. W. 929; Brewer v. Flint &c. R. Co., 56 Mich. 620, 23 N. W. 440; Pittsburgh &c. R. Co. v. Henly, 48 Ohio St. 608, 29 N. E. 575, 15 L. R. A. 384; Simms v. South Carolina R. Co., 26 S. Car. 490, 2 S. E. 486; Whitman v. Wisconsin Cent. R. Co., 58 Wis. 408, 17 N. W. 124; Kelly v. Abbott, 63 Wis. 307, 23 N. W. 890, 53 Am. Rep. 292 and note. We are, of course, referring to the common law rule and not here considering the question under statutes or safety appliance act of Congress.

[55] Northern Pacific R. Co. v. Charless, 51 Fed. 562; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Chicago &c. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688; Bailey v. Rome &c. R. Co., 139 N. Y. 302, 34 N. E. 918; Hayden v. Platt, 84 Hun 487, 32 N. Y. S. 1144; Galveston &c. R. Co. v. Templeton, 87 Tex. 42, 25 S. W. 135, 26 S. W. 1066; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063; Beard v. Chesapeake &c. R. Co., 90 Va. 351, 18 S. E. 559. See Rehm v. Pennsylvania &c. R. Co., 164 Pa. St. 91, 30 Atl. 356; Louisville &c. R. Co. v. Binion, 98 Ala. 570, 14 So. 619. See also Chicago &c. R. Co. v. Tackett, 33 Ind. App. 379, 71 N. E. 524; Gerstner v. New York Cent. R. Co., 81 App. Div. 562, 80 N. Y. S. 1063, affirmed in 178 N. Y. 627, 71 N. E. 1131. In Chicago &c. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. 259, it is held that a switchman in a yard is not chargeable with knowledge of defects in the brakes of a car. The court cited Chicago &c. R. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661. See generally

sufficient to charge the employer with liability,[56] for the general rule that the test of liability is negligence and that the occurrence of an accident does not of itself establish negligence applies to such cases. The rule that an employer is not liable for latent defects not discoverable by the exercise of ordinary care applies to such equipments as brakes.[57]

§ 1860 (1296b). **Brakes, couplers and other safety appliances —Act of Congress.**—An act of Congress requires power or train brakes, automatic couplers and grab-irons or hand holds on cars used in the territories and the District of Columbia, and in interstate commerce.[58] The word "car" in this act includes all kinds of cars running on the rails, and a locomotive is such a car.[59]

Brinkmeier v. Missouri Pac. R. Co., 69 Kans. 738, 77 Pac. 586; Garner v. Metropolitan St. R. Co., 128 Mo. App. 401, 107 S. W. 427 (motorman does not assume risk of defective brake on approaching car); International &c. R. Co. v. Owens, 58 Tex. Civ. App. 177, 124 S. W. 210 (switchman does not assume risk of defective brake); Paine v. Eastern &c. R. Co., 91 Wis. 340, 64 N. W. 1005; Rogers v. Louisville &c. R. Co., 88 Fed. 462.

[56] Mixter v. Imperial &c. R. Co., 152 Pa. St. 395, 25 Atl. 587; Haskins v. New York &c. R. Co., 79 Hun 159, 29 N. Y. S. 274; McCray v. Galveston &c. R. Co. (Tex. Civ. App.), 32 S. W. 548.

[57] Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574. See also Carpenter v. Mexican &c. R. Co., 39 Fed. 315; Louisville &c. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108. So where the defect is caused by a sudden injury and the company has neither actual nor constructive notice. Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Mensch v. Pennsylvania R. Co., 150 Pa. St. 598, 25 Atl. 31, 17 L. R. A. 450; Fenderson v. Atlantic City R. Co., 56 N. J. L. 708, 31 Atl. 767; Louisville &c. R. Co. v. Law, 14 Ky. L. 850, 21 S. W. 648.

[58] U. S. Stat. at L., XXVII, 531; XXIX, 85; XXXII, 943.

[59] Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363; United States v. Chicago &c. R. Co., 157 Fed. 616; Wabash R. Co. v. United States, 172 Fed. 864. But see Larabee v. New York &c. R. Co., 182 Mass. 348, 66 N. E. 1032. As to what is not sufficient to comply with the act, and for cases in which the company has been held negligent, see Chicago &c. R. Co. v. Voelker, 129 Fed. 522, 70 L. R. A. 264; Philadelphia &c. Ry. Co. v. Winkler, 4 Pen. (Del.) 387, 56 Atl. 112. See also St. Louis &c. R. Co. v. York, 92 Ark. 554, 123 S. W. 376; Greenlee v. Southern R. Co., 122 N. Car. 977, 30 S. E. 115, 41 L. R. A. 699, 65 Am. St. 734; Southern R. Co. v.

But it is held that the act in question was not intended to put a premium on carelessness or to grant immunity from negligence, and that the employe cannot recover if he is guilty of contributory negligence.[60] This act of Congress is more fully treated in a subsequent section where state safety appliance acts are also considered.

§ 1861 (1297). Engineers and firemen—Assumption of risks. —The established principle that the test of an employer's liability is not danger, but negligence, applies to enginemen, and so does the general rule of the assumption of risks by employes. The rule that requires reasonably careful inspections, made at reasonable intervals and with ordinary care, applies to the class above named as well as to other employes. The fact that an engine requires, in the exercise of reasonable care, that inspection be made oftener than inspections of some other appliances, does not change the rule that ordinary care is the standard of duty, nor does the danger of the service change the rule as to the employe's assumption of all the ordinary risks of the service. It is true that the danger from the use of engines may make a higher degree of care necessary than is necessary in regard to some other appliances, but it is not true, as has been sometimes loosely said, that more than ordinary care is required in keeping engines safe for use, although it is true that in order to constitute ordinary care the care must be reasonably proportionate to the known danger. It may be said, generally, that enginemen assume the ordinary risks of the service, and risks from defects

Simmons, 105 Va. 651, 55 S. E. 459; United States v. Atchison &c. R. Co., 167 Fed. 696. See also post, § 1883.

[60] Arrighi v. Denver &c. R. Co., 129 Fed. 347; Gilbert v. Burlington &c. Ry. Co., 128 Fed. 529; Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356, 49 S. E. 489; Chicago &c. R. Co. v. Voelker, 129 Fed. 522, 70 L. R. A. 264. But it is held in the last case cited that he did not assume the risk caused by the company's violation of the statute. And see Greenlee v. Southern Ry. Co., 122 N. Car. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. 734; Kansas City &c. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457. See also as to the duty of the employe to still use reasonable care, Cleveland &c. R. Co. v. Baker, 91 Fed. 224; Sprague v. Southern R. Co., 92 Fed. 59. But compare Missouri &c. R. Co. v. Keefe, 37 Tex. Civ. App. 588, 84 S. W. 679.

in road-beds and tracks and in engines and appliances known to them, as well as dangers of the service of which they have knowledge in cases where they continue in the service after the acquisition of such knowledge.[61] Enginemen do not, however, assume the risks of extraordinary dangers attributed to a breach of duty on the part of the company,[62] nor are they chargeable as with the risks of service where they do not know and could

[61] Texas &c. R. Co. v. Minnick, 61 Fed. 635; Fordyce v. Edwards, 60 Ark. 438, 30 S. W. 758; St. Louis &c. R. Co. v. Holman, 90 Ark. 555, 120 S. W. 146; Nelson v. Central &c. R. Co., 88 Ga. 225, 14 S. E. 210; East Tennessee &c. R. Co. v. Head, 92 Ga. 723, 18 S. E. 976; Drake v. Union Pacific R. Co., 2 Idaho 453, 21 Pac. 560; Kuhns v. Wisconsin &c. R. Co., 70 Iowa 561, 31 N. W. 868; Scott v. Darby &c. Co., 90 Iowa 689, 57 N. W. 619; Thain v. Old Colony &c. R. Co., 161 Mass. 353, 37 N. E. 309; Bellows v. Pennsylvania &c. R. Co., 157 Pa. St. 51, 27 Atl. 685; Derr v. Lehigh &c. R. Co., 158 Pa. St. 365, 27 Atl. 1002, 38 Am. St. 848; Gulf &c. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556; Southern &c. R. Co. v. Leash, 2 Tex. Civ. App. 68, 21 S. W. 563; Manson v. Eddy, 3 Tex. Civ. App. 148, 22 S. W. 66; Texas &c. R. Co. v. McKee, 9 Tex. Civ. App. 100, 29 S. W. 544; Helfrich v. Ogden City R. Co., 7 Utah 186, 26 Pac. 295. See generally Sweeney v. Minneapolis &c. R. Co., 33 Minn. 153, 22 N. W. 289, 22 Am. & Eng. R. Cas. 302; Bridges v. Tennessee &c. R. Co., 109 Ala. 287, 19 So. 495; Rodgers v. Central &c. R. Co., 67 Cal. 607, 8 Pac. 377, 22 Am. & Eng. R. Cas. 305, and note; Denver &c. R. Co. v. Scott, 34 Colo. 99, 81 Pac. 763; Illinois &c. R. Co. v. Patterson, 69 Ill. 650, 93 Ill. 290; Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Johnson v. Galveston &c. R. Co. (Tex. Civ. App.), 30 S. W. 95; Norfolk &c. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522.

[62] Union Pac. R. Co. v. O'Brien, 49 Fed. 538; Town v. Michigan &c. R. Co., 84 Mich. 214, 47 N. W. 665; Missouri &c. R. Co. v. Henry, 75 Tex. 220, 12 S. W. 828. See generally Texas &c. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60 and note, 42 Am. & Eng. R. Cas. 7; McFee v. Vicksburg &c. R. Co., 42 La. Ann. 790, 7 So. 720; Henry v. Wabash &c. R. Co., 109 Mo. 488, 19 S. W. 239; Western &c. R. Co. v. Russell, 144 Ala. 142, 39 So. 311. It has been held that negligence can not be imputed to a fireman for a failure to secure compliance with the company's rules by the engineer. New Jersey &c. R. Co. v. Young, 49 Fed. 723. In International &c. R. Co. v. Moynahan, 33 Tex. Civ. App. 302, 76 S. W. 803, an engineer was held not to have assumed the risk from a misplaced switch, though he used a defective headlight without objection and might have avoided the injury if the headlight had been perfect.

not, in the exercise of ordinary care, know of the danger caused by the employer's negligence.[63] Thus, in a recent case where a fireman was injured in consequence of defects in the apron bridging the space between the engine and tender, it appeared that he had not fired on the engine before, that when he boarded the engine the apron was covered with coal, and he did not learn of the defects until after he had cleared up the coal during the progress of the trip, and that he did not know the cause of the defects, nor of the danger incident to the use of the apron in that condition, it was held that he did not assume the risk and that he was not guilty of contributory negligence in failing to abandon the engine after the discovery of the defects.[64] So, it has been held that an engineer does not assume, as an ordinary risk of the service, the danger of cars escaping from a siding and running loose and unattended on the main track where they are liable to be run into by a regular train.[65] And engineers and other trainmen of that kind may usually assume that the duty of the master as to road-bed and tracks has been performed, and do not have the opportunity and are not required to discover defects therein to the same extent as some other employes.[66] It is also true, that where an accident happens to a part of the engine or a defect therein is first discovered while on the road the emergency and the engineer's duty to the public as well as his employer may be such that he will not be deemed to have assumed the risk or to be guilty of contributory neg-

[63] St. Louis &c. R. Co. v. McLain, 80 Tex. 85, 15 S. W. 789. If there was knowledge of the defect, the rule stated in text would not apply. Green v. Cross, 79 Tex. 130, 15 S. W. 220; Fancher v. New York &c. R. Co., 75 Hun 350, 27 N. Y. S. 62.

[64] Missouri &c. R. Co. v. Dumas (Tex. Civ. App.), 93 S. W. 493; Galveston &c. R. Co. v. Fitzpatrick (Tex. Civ. App.), 83 S. W. 406.

[65] Jones v. Kansas City &c. R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. 434. See also Troxell v. Delaware &c. R. Co., 180 Fed. 871.

[66] Northern Ala. R. Co. v. Shea, 142 Ala. 119, 37 So. 796; Georgia &c. R. Co. v. Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. 47; Denver &c. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Southern R. Co. v. Bufkins, 45 Ind. App. 80, 89 N. E. 326, 90 N. E. 98; Smith v. Chicago &c. R. Co., 82 Kans. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255n, and note citing some of the above and other authorities. Such defects are not assumed in the contract of employment. Union Pac. R. Co. v.

ligence in completing his run or at least going on to the next station.[67] The general rule is that enginemen assume the risks incident to the employer's methods of business;[68] and there is, indeed, no valid reason why they should be excepted from that rule in ordinary cases. It has been held that where a railroad company sends one of its locomotives and its engineer in charge of it to do work on the track of another company, it is not liable for injuries to the engineer caused by the defects in the track of the company for which the work is done.[69] The fact that an accident happened is not, of itself, sufficient to charge the employer, for negligence must also be shown.[70] Thus, where an employe working on an engine was injured in an accident caused by a defective rail, and the track had been inspected

O'Brien, 49 Fed. 338, affirmed in 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; Smith v. Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302, 91 Am. St. 438; Osterhout v. Jersey City &c. St. R. Co., 73 N. J. L. 42, 62 Atl. 190.

[67] Koreis v. Minneapolis &c. R. Co., 108 Minn. 449, 122 N. W. 668, 25 L. R. A. (N. S.) 339; Fordyce v. Edwards, 60 Ark. 438, 30 S. W. 758; Pierson v. New York &c. R. Co., 53 App. Div. 363, 65 N. Y. S. 1039.

[68] Illinois Cent. R. Co. v. Neer, 31 Ill. App. 126; Sutherland v. Troy &c. R. Co., 125 N. Y. 737, 26 N. E. 609; France v. Rome &c. R. Co., 88 Hun 318, 34 N. Y. S. 408. The text is quoted in Stone v. Union Pac. R. Co., 35 Utah 305, 100 Pac. 374.

[69] Dunlap v. Richmond &c. R. Co., 81 Ga. 136, 7 S. E. 283. But see Story v. Concord &c. R. Co., 70 N. H. 364, 48 Atl. 288; 4 Thomp. Neg. §§ 3730, 3735, 4483. As to competency of an engineer, see Holland v. Southern &c. R. Co., 100 Cal. 240, 34 Pac. 616; Mexican &c. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; Missouri &c. R. Co. v. Patton (Tex. Civ. App.), 25 S. W. 339; Galveston &c. R. Co. v. Eckols, 7 Tex. Civ. App. 429, 26 S. W. 1117.

[70] Mire v. East Louisiana R. Co., 42 La. Ann. 385, 7 So. 473; Chicago &c. R. Co. v. Dunn, 23 Ill. App. 148; Gulf &c. R. Co. v. Pettis, 69 Tex. 689, 7 S. W. 93; Galveston &c. R. Co. v. Goodwin (Tex. Civ. App.), 26 S. W. 1007. See also Yarnell v. Kansas City &c. R., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599, but compare Stoker v. St. Louis &c. R. Co., 105 Mo. 192, 16 S. W. 591; Jones v. Kansas City &c. R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. 434. And see where accident happened a short time and distance from place of inspection, Koreis v. Minneapolis &c. R. Co., 108 Minn. 449, 122 N. W. 668, 25 L. R. A. (N. S.) 339, 133 Am. St. 462; Sheedy v. Chicago &c. R. Co., 55 Minn. 357, 57 N. W. 60.

about two weeks prior to the accident, it was held that the employer was not liable, because not guilty of negligence.[71] Where there is evidence that the risk was one assumed by an engineman and there is no conflict, it is the duty of the court to direct a verdict for the defendant.[72] Enginemen who remain at their posts in order to protect persons on their trains are not guilty of a breach of duty.[73]

[71] Burrell v. Gowen, 134 Pa. St. 527, 19 Atl. 678. See also Illinois &c. R. Co. v. Quirk, 51 Ill. App. 607; Ragon v. Toledo &c. R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. 336. If an injury to an engineman results from the act of a fellow-servant, the company is not liable. Illinois Central R. Co. v. Jones (Miss.), 16 So. 300. But if negligence of employer is the proximate cause, the employe may recover, although a fellow-servant was also negligent. Clyde v. Richmond &c. R. Co., 59 Fed. 394. See Texas &c. R. Co. v. Patton, 61 Fed. 259; Campbell v. Wing, 5 Tex. Civ. App. 431, 24 S. W. 360; Englehardt v. Delaware &c. R. Co., 78 Hun 588, 29 N. Y. S. 425; Cole v. Rome &c. R. Co., 72 Hun 467, 25 N. Y. S. 276. In Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. 791, 799, the court says that the duties of the company to its trainmen may be stated as follows: "1. To provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in order, and making proper inspections and tests. 2. To exercise like care in providing and retaining sufficient and suitable servants for the conduct of the business. 3. To establish proper rules and regulations for the service, and, having adopted such, to conform to them."

[72] Southern &c. R. Co. v. Johnson, 69 Fed. 559, citing many cases upon the question of the duty of the court to direct a verdict, and upon the question of the assumption of risks, among them Buzzell v. Loconia Manuf. Co., 48 Maine 113, 77 Am. Dec. 212, and note; Fitzgerald v. Connecticut &c. Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. 537; Mundle v. Hill Manuf. Co., 86 Maine 400, 403, 30 Atl. 16; Judkins v. Maine &c. R. Co., 80 Maine 417, 14 Atl. 735; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Sweeney v. Central &c. R. Co., 57 Cal. 15. The court also quoted with approval from Short v. New Orleans &c. R. Co., 69 Miss. 848, 13 So. 826, the following: "The deceased was killed, and no one knows how. That is not enough to subject the railroad company to liability. Negligence must be shown." See also Chandler v. New York &c. R. Co., 159 Mass. 589, 35 N. E. 89; Redmond v. Delta Lumber Co., 96 Mich. 545, 55 N. W. 1004.

[73] Pennsylvania R. Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; Cottrill v. Chicago &c. R. Co., 47 Wis.

§ 1862 (1298). **Dangers from running of trains—Section men, trackmen and the like.**—Ordinarily section men or trackmen assume the risk incident to the running of trains, whether extra trains or trains running on schedule time.[74] Such employes are bound to know that regular trains may be delayed and pass at

634, 3 N. W. 376, 32 Am. Rep. 796. See also Smith v. Wrightsville &c. R. Co., 83 Ga. 671, 10 S. E. 361. And compare Flynn v. Kansas City &c. R. Co., 78 Mo. 195, 47 Am. Rep. 99. As to contributory negligence of enginemen, see Illinois Cent. R. Co. v. Murphy, 52 Ill. App. 65; Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; Whitcomb v. McNulty, 105 Fed. 863; Louisville &c. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Devine v. Savannah &c. R. Co., 89 Ga. 541, 15 S. E. 781; Chicago &c. R. Co. v. Flynn, 54 Ill. App. 387; Illinois &c. R. Co. v. Patterson, 93 Ill. 290; Lake Shore &c. R. Co. v. Wilson, 11 Ind. App. 488, 38 N. E. 343; Haas v. Chicago &c. R. Co., 90 Iowa 259, 57 N. W. 894; Sweeney v. Minneapolis &c. R. Co., 33 Minn. 153, 22 N. W. 289; Merritt v. Great Northern R. Co., 81 Minn. 496, 84 N. W. 321; Illinois &c. R. Co. v. Guess, 74 Miss. 170, 21 So. 50; Barry v. Hannibal &c. R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. 610; Pennsylvania Co. v. Hammond, 1 Ohio Dec. 298; Nattress v. Philadelphia &c. R. Co., 150 Pa. St. 527, 24 Atl. 753; Fritz v. Missouri &c. R. Co. (Tex. Civ. App.), 30 S. W. '85; International &c. R. Co. v. Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922; Norfolk &c. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522; Robinson v. West Va. &c. R. Co., 40 W. Va. 583, 21 S. E. 727; Hulien v. Chicago &c. R. Co., 107 Wis. 122, 82 N. W. 710.

[74] Northern &c. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Kansas &c. R. Co. v. Dye, 70 Fed. 24; Kansas &c. R. Co. v. Waters, 70 Fed. 28; Connelley v. Pennsylvania R. Co., 201 Fed. 54, 47 L. R. A. (N. S.) 867; Baltimore &c. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Pennsylvania Co. v. Wachter, 60 Md. 395; Olson v. St. Paul &c. R. Co., 38 Minn. 117, 35 N. W. 866, 33 Am. & Eng. R. Cas. 386; Larson v. St. Paul &c. R. Co., 43 Minn. 423, 45 N. W. 722; Railway Co. v. Leech, 41 Ohio St. 388; McGrath v. New York &c. R. Co., 14 R. I. 357, 18 Am. & Eng. R. Cas. 5; McGrath v. York &c. R. Co., 14 R. I. 357; International &c. R. Co. v. Hester, 64 Tex. 401; Woodley v. Metropolitan R. Co., L. R. 2 Exch. Div. 384. See generally Cooney v. Great Northern &c. R. Co., 9 Wash. 292, 37 Pac. 438; International &c. R. Co. v. Arias, 10 Tex. Civ. App. 190, 30 S. W. 446; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Elliot v. Chicago &c. R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363. See also Hoffard v. Illinois Cent. R. Co., 138 Iowa 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797; Keefe v. Chicago &c. R. Co., 92 Iowa 182, 60 N. W. 503, 54 Am. St. 542; Rush v. Missouri Pac. R. Co., 36 Kans.

uncertain intervals and that wild or extra trains may be sent over the road and they assume the risks of danger therefrom,[75] except in cases where by some act or conduct the employer has impliedly or expressly represented that no wild or extra trains shall imperil the safety of such employes. It has also been held that the fact that the train was running at an unusual rate of speed at the place of injury and in violation of a city ordinance does not relieve a section man from the rule that such employes assume the risk of wild as well as regular trains running over the tracks at all times at any rate of speed, without warning except from the noise of the train, and by the customary signals.[76] Where, by special order, an employe is

129, 12 Pac. 582; Morris v. Boston &c. R. Co., 184 Mass. 368, 68 N. E. 680; Carlson v. Cincinnati &c. R. Co., 120 Mich. 481, 79 N. W. 688; Appel v. Buffalo &c. R. Co., 111 N. Y. 550, 19 N. E. 93; Couch v. Charlotte &c. R. Co., 22 S. Car. 557; notes in 6 L. R. A. (N. S.) 646, and in 48 L. R. A. (N. S.) 152. Some of the statements in Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104, are erroneous because the court lost sight of the distinction between the assumption of risks and contributory negligence. For other cases involving assumption of risks by switchmen, see St. Louis &c. R. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295 (riding on freight car when duty requires); St. Louis &c. R. Co. v. Brisco, 100 Tex. 354, 99 S. W. 1020 (riding on hand car).

[75] Hinz v. Chicago &c. R. Co., 93 Wis. 16, 66 N. W. 718; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Chicago &c. R. Co. v. Yost, 56 Nebr. 439, 76 N. W. 901. See also Shepard v. Boston &c. R. Co., 158 Mass. 174, 33 N. E. 508; Olson v. St. Paul &c. R. Co., 38 Minn. 117, 35 N. W. 866; Martini v. Oregon-Washington R. &c. Co., 73 Ore. 283, 144 Pac. 104, 107 (quoting text). But compare Cincinnati &c. R. Co. v. Lang, 118 Ind. 579, 21 N. E. 317.

[76] Ives v. Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 452. See also Vaundry v. Chicago &c. R. Co., 130 Wis. 283, 109 N. W. 926; Norfolk &c. R. Co. v. Gesswine, 144 Fed. 56; Bengtson v. Chicago &c. R. Co., 47 Minn. 486, 50 N. W. 531. But compare Camp v. Chicago &c. R. Co., 124 Iowa 238, 99 N. W. 735; Hoffard v. Illinois Cent. R. Co., 138 Iowa 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797; Chicago &c. R. Co. v. Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; Pittsburg &c. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, 11 Ann. Cas. 879; Wabash R. Co. v. Gretzinger, 182 Ind. 155, 104 N. E. 69 (no assumption of risks where speed ordinance was violated); Houston &c. R. Co. v. Turner (Tex. Civ. App.), 92 S. W. 1074.

assigned to special work at a particular place the employer is bound to exercise ordinary care to prevent injury to the employe, and ordinary care under such circumstances requires that the employer should take precautions to prevent injury to the employe at the particular place. Thus, where an employe is by special order required to do work outside of his ordinary line of employment at a particular place on the track it is incumbent on the employer not to run wild or extra trains over such place without some warning to the employe, but this duty does not extend to a place not designated in the special order.[77] A railroad company is not bound to moderate the speed of a regular train on time in favor of a watchman who is employed to keep trespassers off the track, and whose duty it is to know the time of trains, even though he is put to work at a place in an incorporated town where the tracks are customarily used by the public.[78] It has been held that the trackmen on a hand-car have a right to act upon the assumption that the employes in control of an approaching train will heed a signal to stop,[79] but the case referred to is based principally upon a case[80] that has been virtually overruled,[81] on the point as to fellow servants and vice principals. In a recent case it is held that a young

[77] Cincinnati &c. R. Co. v. Long, 112 Ind. 166, 13 N. E. 659, 31 Am. & Eng. R. Cas. 138. The liability of the employer in such a case as that cited does not rest upon the mere fact of assignment to a special duty by a special order, but upon the fact that having assigned the employe to a special duty at a particular place the employer impliedly undertook that the place should not be made unsafe by wild trains. See North Chicago &c. Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Abbitt v. Lake Erie &c. R. Co. (Ind.), 40 N. E. 40; Hawley v. Chicago &c. R. Co., 71 Iowa 717, 29 N. W. 787.

[78] Wickham's Adm'r v. Louisville &c. R. Co., 135 Ky. 288, 122 S. W. 154, 48 L. R. A. (N. S.) 150. But compare Pittsburgh &c. R. Co. v. Hoffman, 57 Ind. App. 431, 107 N. E. 315.

[79] Howard v. Delaware &c. R. Co., 40 Fed. 195, 6 L. R. A. 75, and note. See Davis v. Central &c. R. Co., 55 Vt. 84, 45 Am. Rep. 590; Hard v. Vermont &c. R. Co., 32 Vt. 473. See also Texas &c. R. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200.

[80] Chicago, Mil. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. ed. 787.

[81] Baltimore &c. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Northern Pac. R. Co.

and inexperienced switch tender did not assume the risk of having his foot caught in the angle of an unblocked frog and being injured by the negligent operation of the defendant's train.[82] In another recent case it is held that while a flagman supplied with a watch box assumes the risks incident to the use of such a box properly located, and such other risks as he knows or should know exist, he does not assume the risk that the box has been placed, without his knowledge, so near the track as to be struck by a passing train.[83] But a flagman at a street crossing, with the company's tracks on either side of him, has been held to necessarily assume the risk incident to the crossing of the tracks in going to and from his work, and to be guilty of contributory negligence in so crossing without looking and listening.[84]

§ 1863 (1298a). **Car inspectors, repairers and cleaners.**—Railroad companies have often been held liable to car inspectors and repairers where they have negligently failed to provide means for protecting them and have negligently injured them.[85] And it has been held that such employes have a right to rely

v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Deavers v. Spencer, 70 Fed. 480; Thom v. Pittard, 62 Fed. 232; Texas &c. R. Co. v. Rogers, 57 Fed. 378. See also Chicago &c. R. Co. v. Geary, 110 Ill. 383.

[82] Mace v. H. A. Boedeker & Co., 127 Iowa 721, 104 N. W. 475.

[83] Philadelphia &c. R. Co. v. Devers, 101 Md. 341, 61 Atl. 418.

[84] O'Neil v. Pittsburg &c. R. Co., 130 Fed. 204. See also Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; Tirrell v. New York &c. R. Co., 180 Mass. 490, 62 N. E. 745; Zulke v. Michigan &c. R. Co., 147 Mich. 192, 116 N. W. 493, 11 Ann. Cas. 50; Wood v. Central &c. R. Co., 127 App. Div. 127, 111 N. Y. S. 91; note in 48 L. R. A. (N. S.) 150; Dyerson v. Union Pac. R. Co., 74 Kans. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132n, 11 Ann. Cas. 207; Coleman v. Pittsburg &c. R. Co., 139 Ky. 559, 63 S. W. 39.

[85] Chicago &c. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383; Streets' Western &c. Line v. Bonander, 196 Ill. 15, 63 N. E. 688; Lake Erie &c. R. Co. v. Hennesey, 177 Ind. 64, 97 N. E. 331; Louisville &c. R. Co. v. Lowe (Ky.), 66 S. W. 736; Abel v. Delaware &c. R. Co., 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; Texas &c. R. Co. v. Cumpson, 15 Tex. Civ. App. 493, 40 S. W. 546; Atchison &c. R. Co. v. Classin

on the performance of this duty by the company.[86] But such employes assume the risk where they have knowledge of the facts and method of the company and continue in the service without objection,[87] and they are guilty of contributory negligence if they negligently fail to take proper steps and obey proper rules for their own protection and thus proximately cause the injury complained of.[88] They do not, however, assume unknown risks or risks with knowledge of which they are not

(Tex. Civ. App.), 134 S. W. 358; Pool v. Southern Pac. Co., 20 Utah 210, 58 Pac. 326. But compare Besel v. New York &c. R. Co., 70 N. Y. 171; Atchison &c. R. Co. v. Carruthers, 56 Kans. 309, 43 Pac. 230.

[86] St. Louis &c. R. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; Louisville &c. R. Co. v. Davis, 91 Ala. 487, 8 So. 552; Louisville &c. R. Co. v. Hanning, 131 Ind. 528, 31 N. E. 187, 31 Am. St. 443. But see Peterson v. Chicago &c. R. Co., 67 Mich. 102, 34 N. W. 260. This is true where it is the established custom. Meadowcroft v. New York &c. R. Co., 193 Mass. 249, 79 N. E. 266. See also Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

[87] Chicago &c. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383; Unfried v. Baltimore &c. R. Co., 34 W. Va. 260, 12 S. E. 512; O'Rorke v. Union &c. R. Co., 22 Fed. 189; Clay v. Chicago &c. R. Co., 56 Ill. App. 235; Keenan v. New York &c. R. Co., 21 N. Y. S. 445, affirmed in 145 N. Y. 190, 39 N. E. 711, 45 Am. St. 604. See also Alabama &c. R. Co. v. Roach, 116 Ala. 360, 23 So. 52; Walton v. Georgia &c. R. Co., 15 Ga. App. 191, 82 S. E. 815; Lane v. North Carolina R. Co., 154 N. Car. 91, 69 S. E. 780; McCain v. Chicago &c. R. Co., 76 Fed. 125; St. Louis &c. R. Co. v. Rea, 99 Tex. 58, 87 S. W. 324; Norfolk &c. R. Co. v. Graham, 96 Va. 430, 31 S. E. 604; Seldomridge v. Chesapeake &c. R. Co., 46 W. Va. 569, 33 S. E. 293.

[88] Cypher v. Huntingdon &c. Co., 149 Pa. St. 359, 24 Atl. 225; Southern Pac. R. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. ed. 485; Chicago &c. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383; Elgin &c. R. Co. v. Herath, 230 Ill. 109, 82 N. E. 610; Pinckney v. Atlantic &c. R. Co., 89 S. Car. 525, 72 S. E. 394, 36 L. R. A. (N. S.) 363. See also Canadian Pac. R. Co. v. Elliott, 137 Fed. 904; Sherman v. Delaware &c. R. Co., 71 Vt. 325, 45 Atl. 227; Spencer v. Ohio &c. R. Co., 130 Ind. 181, 29 N. E. 915; Russell v. Louisville &c. R. Co. (Ky.), 124 S. W. 841; Roux v. Morgan's La. &c. Co., 127 La. 240, 53 So. 550; Van Camp v. Wabash R. Co., 141 Mo. App. 344, 125 S. W. 530; note in 46 L. R. A. (N. S.) 877. But see Murphy v. New York Cent. R. Co., 118 N. Y. 527, 23 N. E. 812; Pool v. Southern R. Co., 20 Utah 210, 58 Pac. 326; Texas &c. R. Co. v. Wynne (Tex.), 22 S. W. 1064; Texarkana &c. Ry. Co. v. Casey (Tex. Civ. App.), 172 S. W. 729; Berry v. Central Iowa R.

chargeable, caused by the negligence of the company.[89] Railway track repairers and the like assume the risk of injury from the running of trains, especially where they are run in accordance with the known custom, or they may be held guilty of contributory negligence where they are injured by their failure to keep a lookout for trains.[90] Yet they cannot reasonably be expected to constantly keep a perfect lookout and at the same time properly attend to their work, and there are many cases in which the question as to whether they exercised reasonable care under the circumstances has been properly left to the jury.[91]

Co., 40 Iowa 564; Louisville &c. R. Co. v. Payne's Adm'r, 177 Ky. 462, 197 S. W. 928, L. R. A. 1918C, 376, and note.

[89] Chicago &c. R. Co. v. Bingenheimer, 116 Ill. 226, 4 N. E. 840; Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679; Hammond Co. v. Mason, 12 Ind. App. 469, 40 N. E. 642; Southern R. Co. v. Hart, 23 Ky. L. 1054, 64 S. W. 650; Atchison &c. R. Co. v. Holt, 29 Kans. 149. See also Missouri &c. Ry. Co. v. Dereberry (Tex. Civ. App.), 167 S. W. 30; Promer v. Michigan &c. R. Co., 90 Wis. 213, 63 N. W. 90, 48 Am. St. 905. But compare Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603; Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418.

[90] Coyne v. Union &c. R. Co., 133 U. S. 370, 10 Sup. Ct. 382, 33 L. ed. 651; Aerkfetg v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. ed. 758; McPeck v. Central Vt. R. Co., 79 Fed. 590; Chicago &c. R. Co. v. Mills, 131 Ill. App. 625; Fisher v. Louisville &c. R. Co., 146 Ind. 558, 45 N. E. 689; Keefe v. Chicago &c. R. Co., 92 Iowa 182, 60 N. W. 503, 54 Am. St. 542; Lynch v. Boston &c. R. Co., 159 Mass. 536, 34 N. E. 1072; Santore v. New York &c. R. Co., 203 Mass. 437, 89 N. E. 619; Regan v. Boston &c. R. Co., 208 Mass. 520, 94 N. E. 691; Carlson v. Cincinnati &c. R. Co., 120 Mich. 48, 79 N. W. 688; Bengtson v. Chicago &c. R. Co., 47 Minn. 486, 50 N. W. 531; Brady v. New York &c. R. Co., 20 R. I. 338, 39 Atl. 186. See also Grand Trunk R. Co. v. Baird, 94 Fed. 946; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Dishon v. Cincinnati &c. R. Co., 133 Fed. 471, for other instances. Soccorso v. Philadelphia &c. R. Co., 166 Fed. 378; Corlette v. Southern Pac. Co., 136 Cal. 642, 69 Pac. 422; Foster v. Chicago &c. R. Co., 127 Iowa 84, 102 N. W. 422; Cannon v. New York &c. R. Co., 194 Mass. 177, 80 N. E. 450; Degonia v. St. Louis &c. R. Co., 224 Mo. 564, 123 S. W. 807; Santis v. St. Louis &c. R. Co., 59 Tex. Civ. App. 405, 126 S. W. 903. And compare Grow v. Oregon &c. R. Co., 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915B, 481n.

[91] See Baltimore &c. R. Co. v. Peterson, 156 Ind. 364, 59 N. E. 1044; West Kentucky Coal Co. v. Davis, 138 Ky. 667, 128 S. W. 1074; St. Louis &c. R. Co. v. Jackson,

§ 1864 (1299). Injuries from explosions.—It is incumbent upon an injured employe who seeks to recover for an injury caused by the explosion of the boiler of a locomotive engine to affirmatively show that the explosion was the proximate result of negligence on the part of the employer. It is not ordinarily presumed from the mere fact that there was an explosion that the employer was guilty of negligence.[92] There must be a sub-

78 Ark. 100, 93 S. W. 746; Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163, affirmed in 119 Ill. 515, 10 N. E. 369; Chicago &c. R. Co. v. Sharmon, 43 Ill. App. 540; Erickson v. St. Paul &c. R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; Torkelson v. Minneapolis &c. R. Co., 117 Minn. 73, 134 N. W. 307. See also Pittsburg &c. R. Co. v. Rogers, 45 Ind. App. 230, 87 N. E. 28; Dowell v. Chicago &c. R. Co., 83 Kans. 562, 112 Pac. 136; Smith v. Southern Pac. R. Co., 58 Ore. 22, 113 Pac. 41, Ann. Cas. 1913A, 434n, and note, to the effect that he is not required to keep a constant lookout, but in general is required to exercise only such vigilance as only such as he can reasonably exercise consistently with the performance of his duties. International &c. R. Co. v. Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063, 1064; Texarkana &c. Ry. Co. v. Casey (Tex. Civ. App.), 172 S. W. 729; Grow v. Oregon &c. R. Co., 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915B, 481n; St. Louis &c. Ry. Co. v. Jackson, 78 Ark. 100, 93 S.W. 746; Ominger v. New York &c. R. Co., 4 Hun (N. Y.) 159. And for cases in which it was held that the risk was not assumed and the employe not guilty of contributory negligence, see Missouri &c. R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838; Chicago &c. R. Co. v. Cullen, 187 Ill. 523, 58 N. E. 455; Tobey v. Burlington &c. R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496; Croll v. Atchison &c. R. Co., 57 Kans. 548, 46 Pac. 972; Swartz v. Great Northern R. Co., 93 Minn. 339, 101 N. W. 504; Card v. Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806; Lake Shore &c. R. Co. v. Murphy, 50 Ohio St. 135, 33 N. E. 403; Conlon v. Oregon &c. R. Co., 23 Ore. 499, 32 Pac. 397; Southern R. Co. v. Pugh, 97 Tenn. 624, 37 S. W. 555; Gulf &c. R. Co. v. Wood (Tex. Civ. App.), 63 S. W. 164. But compare Fisk v. Chicago &c. R. Co., 111 Iowa 392, 82 N. W. 931; Roskoyek v. St. Paul &c. R. Co., 76 Minn. 28, 78 N. W. 872; Tomko v. Central R. Co., 1 App. Div. 298, 37 N. Y. S. 144; Louisville &c. R. Co. v. Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. 21.

[92] Racine v. New York &c. R. Co., 70 Hun 453, 24 N. Y. S. 388. See also Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. 613; Hanley v. West Virginia &c. R. Co., 59 W. Va. 419, 53 S. E. 625, 629 (citing text); Marshall v. Wellswood, 38 N. J. L. 399;

stantive evidence of negligence, for negligence cannot be presumed nor can the existence of negligence be left to conjecture.[93] It is not necessary to establish negligence by direct or positive evidence,[94] but there must be evidence of such facts or circumstances as by fair and reasonable inference authorizes the conclusion that the employer was negligent.[95] The existence of negligence cannot, however, be established by forced, unnatural or unreasonable inferences. The general rule is that negligence must be proved by the plaintiff as part of his case, for it cannot

John Morris Co. v. Southworth, 154 Ill. 118, 39 N. E. 1099. The text is also cited, but the case distinguished in Louisville &c. R. Co. v. Lynch, 147 Ind. 165, 175, 46 N. E. 471, 472. Discovery of a defect after the occurrence of an accident is not sufficient evidence of negligence. Indianapolis &c. R. Co. v. Toy, 91 Ill. 474, 33 Am. Rep. 57; Perry v. Michigan &c. R. Co., 108 Mich. 130, 65 N. W. 608; Robinson v. Charles Wright Co., 94 Mich. 283, 53 N. W. 938; Toomey v. Eureka &c. Steel Works, 89 Mich. 249, 50 N. W. 850. See generally Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Kirkpatrick v. New York &c. R. Co., 79 N. Y. 240; Stevenson v. Jewett, 16 Hun (N. Y.) 210. It may be that where defects found after the occurrence show clearly that they existed before the accident and were such that a reasonably careful inspection would have revealed them, the employer is liable. New Albany Woolen Mills Co. v. Senior, 53 Ind. App. 453, 101 N. E. 1025. But the mere fact that defects did exist will not establish a liability, for much more is required to make the employer liable.

[93] Brunner v. Blaisdell, 170 Pa. St. 25, 32 Atl. 607; Hudson v. Rome &c. R. Co., 145 N. Y. 408, 40 N. E. 8. The text is also cited in Powers v. Pere Marquette R. Co., 143 Mich. 379, 106 N. W. 1117, 1118. See also Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Cosulich v. Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. 475; Veith v. Hope Salt Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410. In some cases the res ipsa loquitur doctrine has been applied, but in most jurisdictions it does not apply as between master and servant and is generally held not to apply in such cases as between such parties where there is an explosion; but there is some conflict of authority, and the nature of the explosion with other comparatively slight evidence of negligence, whether direct or circumstantial, may be sufficient. See note in L. R. A. 1917E, 187-198.

[94] See Kirkpatrick v. New York &c. R. Co., 79 N. Y. 240; California &c. Co., Re, 110 Fed. 678; Chicago &c. R. Co. v. Sharmon, 43 Ill. 338.

[95] See Southern Ind. R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097, 1099, citing text.

be presumed,[96] and there is no reason why this rule should not apply to cases of injury resulting from the explosion of locomotive boilers. Where the explosion is the proximate result of the employer's failure to exercise ordinary care in procuring a reasonably safe locomotive, or the failure to exercise ordinary care in keeping it in a reasonably safe condition, an action may be maintained by an employe who is free from contributory fault, and who did not know of the unsafe condition of the locomotive.[97] The duty of the employer so far as regards inspection is to use ordinary care and to employ the mode of inspection ordinarily and generally in use by railroad companies, but this duty does not require the employer to dismantle the engine or to take it apart.[98]

§ 1865 (1300). Injuries from collisions.—We think that principle and authority warrant the conclusion that a railroad com-

[96] Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Trapnell v. Red Oak Junction, 76 Iowa 744, 39 N. W. 884; Perry v. Michigan &c. R. Co., 108 Mich. 130, 65 N. W. 608; Fenderson v. Atlantic City R. Co., 56 N. J. L. 708, 31 Atl. 767; Lehman v. Brooklyn, 29 Barb. (N. Y.) 234; Payne v. Forty-second St. &c. R. Co., 40 N. Y. Super. Ct. 8; Stager v. Ridge Avenue &c. R. Co., 119 Pa. St. 70, 12 Atl. 821; Ford v. Anderson, 139 Pa. St. 261, 21 Atl. 18; Sorenson v. Menasha &c. R. Co., 56 Wis. 338, 14 N. W. 446; Sherman v. Menominee &c. Co., 77 Wis. 14, 45 N. W. 1079; ante, § 1847; post, § 1876.

[97] Pennsylvania &c. R. Co. v. Mason, 109 Pa. St. 296, 58 Am. Rep. 722; Ford v. Fitchburg &c. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Keegan v. Western &c. R. Co., 8 N. Y. 175, 59 Am. Dec. 476. See generally Chicago &c. R. Co. v. Rung, 104 Ill. 641, 11 Am. & Eng. R. Cas. 218; Atchison &c. R. Co. v. Holt, 29 Kans. 149, 11 Am. & Eng. R. Cas. 206; Greene v. Minneapolis &c. R. Co., 31 Minn. 248, 47 Am. R. 785. Risk of explosion from boiler in weakened condition, which employe knew, held assumed by him in Ware v. Ithaca St. R. Co., 125 App. Div. 323, 109 N. Y. S. 426. For cases of injuries from defective engines, Cone v. Delaware &c. R. Co., 81 N. Y. 206, 37 Am. Rep. 491; Ford v. Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

[98] Clyde v. Richmond &c. R. Co., 65 Fed. 482; Richmond &c. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. ed. 728; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; Chicago &c. R. Co. v. Dubois, 65 Ill. App. 142; Louisville &c. R. Co. v. Allen, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

pany is not usually liable at common law for injuries resulting to its employes engaged in operating its trains caused by its trains coming into collision through the fault of the employes in charge of one or both of the trains.[99] If, however, the collision is caused by a negligent breach of duty resting on the company and not assumed by the injured employes then the company is liable to injured employes who are free from contributory fault. Whether the company is liable depends upon whether the negligence is that of the company or that of a fellow servant. If the negligence is that of the employer, or,

[99] Jordan v. Wells, 3 Woods (U. S.) 527; Easton v. Houston &c. R. Co., 32 Fed. 893; Van Avery v. Union Pac. R. Co., 35 Fed. 40; Bull v. Mobile &c. R. Co., 67 Ala. 206; Terre Haute &c. R. Co. v. Becker, 146 Ind. 202, 45 N. E. 96; Henry v. Lake Shore &c. R. Co., 49 Mich. 495, 13 N. W. 832; Relyea v. Kansas City &c. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817, and note, 53 Am. & Eng. R. Cas. 578; Paulmier v. Erie &c. R. Co., 34 N. J. L. 157; Brown v. Southern R. Co., 126 N. Car. 458, 36 S. E. 19; Murray v. South Carolina R. Co., 1 McMullen (S. Car.) 385, 36 Am. Dec. 268 and note; Ragsdale v. Memphis &c. R. Co., 3 Baxter (Tenn.) 426; Nashville &c. R. Co. v. Handman, 13 Lea (Tenn.) 423; Gulf &c. R. Co. v. Blohn, 73 Tex. 637, 11 S. W. 867; Fowler v. Chicago &c. R. Co., 61 Wis. 159, 21 N. W. 40, 17 Am. & Eng. R. Cas. 536; Pease v. Chicago &c. R. Co., 61 Wis. 163, 20 N. W. 908, 17 Am. & Eng. R. Cas. 327; Hutchinson v. York &c. R. Co., 5 Exch. 343. See Manville v. Cleveland &c. R. Co., 11 Ohio St. 417; Kentucky &c. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691, 12 Am. St. 480. See also for cases in which it was held that the risk was assumed: Illinois Cent. R. Co. v. Neer, 26 Ill. App. 356; Hewitt v. Flint &c. R. Co., 67 Mich. 61, 34 N. W. 659; Rumsey v. Delaware &c. R. Co., 151 Pa. St. 74, 25 Atl. 37; Bancroft v. Boston &c. R. Co., 67 N. H. 466, 30 Atl. 409; Gulf &c. R. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556. In Birmingham &c. R. Co. v. Jacobs, 101 Ala. 149, 13 So. 408, 55 Am. & Eng. R. Cas. 299, it was held that an engineer of a train injured because of the failure of the engineer of another train to stop as the statute requires before crossing could recover. See Chicago &c. R. Co. v. McLallen, 84 Ill. 109. We do not here consider the question of concurrent negligence, but we may say that if the negligence is what has been called "the promoting cause of the injury," namely that of a fellow-servant, there can be no recovery. Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Gilman v. Eastern &c. R. Co., 10 Allen (Mass.) 233, 87 Am. Dec. 635; King v. Boston &c. R. Co., 9 Cush. (Mass.) 112; Hayes v. Western &c. R. Co., 3 Cush. (Mass.) 270; New Orleans &c. R. Co. v. Hughes, 49 Miss. 258.

which in legal contemplation is the same thing, that of a vice principal, the employe if not guilty of contributory negligence may recover damages for the injuries sustained.[1] It is held in accordance with the general rule that there is no presumption of negligence, and that the fact that a collision occurs is not prima facie evidence as between the company and its employe that the company was negligent.[2] Where a collision is the result of a pure accident and not of negligence there can be no recovery.[3] If the plaintiff is guilty of contributory negligence there can be no recovery.[4] In a comparatively recent case the court in a well-reasoned opinion applied the doctrine of proxi-

[1] Nary v. New York &c. R. Co., 55 Hun 612, 125 N. Y. 759, 9 N. Y. S. 153; Lowery v. Manhattan &c. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; Bossout v. Rome &c. R. Co., 126 N. Y. 646, 27 N. E. 853, 57 Hun 589, 10 N. Y. S. 602; North Chicago &c. R. Co. v. Johnson, 114 Ill. 57, 29 N. E. 186. In Vose v. Lancashire &c. R. Co., 2 Hurlst. & N. 728, it was held that the employer was liable because it had neglected to provide proper rules. See Ryan v. New York &c. R. Co., 35 N. Y. 210, 91 Am. Dec. 49; Whittaker v. Delaware &c. R. Co., 126 N. Y. 544, 27 N. E. 1042; Lake Shore &c. R. Co. v. Hundt, 140 Ill. 525, 30 N. E. 458. See also generally McGraw v. Texas &c. R. Co., 50 La. Ann. 466, 23 So. 461, 69 Am. St. 450; Felton v. Harbeson, 104 Fed. 737.

[2] Smith v. Missouri &c. R. Co., 113 Mo. 70, 20 S. W. 896; Northern Pac. R. Co. v. Dixon, 139 Fed. 737, 740. There is some conflict.

[3] Toner v. Chicago &c. R. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433, 31 Am. & Eng. R. Cas. 320. See Hulehan v. Green Bay &c. R. Co., 68 Wis. 520, 32 N. W. 529.

[4] Hall v. Chicago &c. R. Co., 46 Minn. 439, 49 N. W. 239; Kansas City &c. R. Co. v. McDonald, 51 Fed. 178; Cottrill v. Chicago &c. R. Co., 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796. In Holland v. Seaboard &c. R. Co., 143 N. Car. 435, 55 S. E. 835, it is held that a brakeman whose duty it was under the rules of the company and the instructions of its conductor, when his train went onto a siding, to lock a switch and remain within ten feet of it, having violated such duty by going into the caboose without locking the switch so that another train ran onto the siding and into the caboose, killing the brakeman, was guilty of contributory negligence, which was the proximate cause of his own injury. But it has been held that the conductor of a work train does not assume the risk of derailment through collision with cattle on the track, even though he knows the track is unfenced, nor the risk of derailment by running the train backward where the only alternative is to run the engine in front but backward, and the relative danger of each method is a matter

mate cause to the case of a collision and held that although the company was guilty of negligence in failing to supply one of the engines with a proper headlight there was no liability for the reason that the defect in the headlight was not the proximate cause of the injury.[5]

§ 1866 (1301). **Cars negligently loaded.**—There is a diversity of opinion upon the question whether a railroad company is liable to employes for injuries resulting from the negligent loading of cars. Some of the cases hold that there is a liability upon the ground that it is the duty of the employer to furnish a safe working place and appliances.[6] It seems to us that this doctrine cannot be defended, at least to the extent to which it has sometimes been carried. The improper or insecure loading of a car is not necessarily a defect in the working place, machinery or appliances, but is ordinarily the improper use of machinery and appliances. There is a difference between the careless or negligent use of machinery and appliances and defects in the machinery or appliances themselves, and the gen-

of opinion. Alexander v. Great Northern Ry. Co., 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E, 852.

[5] New York &c. R. Co. v. Perriguey, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976. See also Pennsylvania &c. R. Co. v. Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. 251.

[6] Houston &c. R. Co. v. Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809; Haugh v. Chicago &c. R. Co., 73 Iowa 66, 35 N. W. 116. See also Atchison &c. R. Co. v. Seeley, 54 Kans. 21, 37 Pac. 104; Austin v. Fitchburg R. Co., 172 Mass. 484, 52 N. E. 527 (master may be liable and questions of assumption of risk and contributory negligence for jury); Irvine v. Flint &c. R. Co., 89 Mich. 416, 50 N. W. 1008; Jacksonville &c. R. Co. v. Galvin, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337; Hosic v. Chicago &c. R. Co., 75 Iowa 683, 37 N. W. 963, 9 Am. St. 518; Louisville &c. R. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767. See Dewey v. Detroit &c. R. Co., 97 Mich. 329, 52 N. W. 942, 56 N. W. 756, 22 L. R. A. 292, 37 Am. St. 348. The dissenting opinion of McGrath, J., in Dewey v. Detroit &c. R. Co., 97 Mich. 329, 52 N. W. 942, 22 L. R. A. 292, 37 Am. St. 348, seems to us to be against principle and authority, but it clearly states the grounds upon which at the original hearing, the company was held liable. See further upon the general subject, Chamberlain v. Southern R. Co., 159 Ala. 171, 48 So. 703; Ferguson &c. Foundry Co. v. Schello, 129 Ill. App. 212; Blackburn v. Louisiana R. &c. Co., 128 La. 319, 54 So. 865.

eral rule is that where the injury is caused by the careless or improper use of machinery or appliances the employer is not liable.[7] It is a departure from principle to hold that the loading of cars is the furnishing of a working place, or that the manner of loading is to be regarded as a defect in the machinery or appliances. In our opinion the manner of loading a car pertains to the operation of the road, and not to the working place or to the machinery or appliances, and the employer is not liable unless it be affirmatively proved that there was negligence on his part in employing servants or agents, or, perhaps, under some circumstances, where it furnishes such a car. We believe that the cases which deny that the employer is liable where fellow servants do the loading assert the true doctrine.[8] It cannot be justly said that the improper loading of a car is a defect

[7] In Pease v. Chicago &c. R. Co., 61 Wis. 163, 20 N. W. 908, the distinction between the different classes of cases is well drawn. A clear discrimination is made in Duffy v. Upton, 113 Mass. 544. See also Reading Iron Works v. Devine, 109 Pa. St. 246; Bergstrom v. Staples, 82 Mich. 654, 46 N. W. 1035; Ell v. Northern &c. R. Co., 1 N. Dak. 336, 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. 621; Spencer v. Ohio &c. R. Co., 130 Ind. 181, 29 N. E. 915, 916; Chicago &c. R. Co. v. Hamilton, 42 Ind. App. 512, 85 N. E. 1044; New York &c. R. Co. v. Perriguey, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976. See generally Howard v. Denver &c. R. Co., 26 Fed. 837; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; Quinn v. New Jersey &c. Co., 23 Fed. 363; Mealman v. Union Pac. R. Co., 37 Fed. 189, 2 L. R. A. 192 and note. It seems quite clear that where the appliances are safe and the use of them causes the accident the proximate cause is the act of a co-employe and not that of the employer. See Thyng v. Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425; Lassiter v. Seaboard &c. R. Co., 150 N. Car. 483, 64 S. E. 202; Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. 133.

[8] Callaway v. Allen, 64 Fed. 297; Jacksonville &c. R. Co. v. Galvin, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337; Toledo &c. R. Co. v. Black, 88 Ill. 112; Brice v. Railway Co., 10 Ky. L. 526, 9 S. W. 288; Dewey v. Detroit &c. R. Co., 97 Mich. 329, 56 N. W. 756, 22 L. R. A. 292, 37 Am. St. 348; Scott v. Oregon &c. Navigation Co., 14 Ore. 211, 13 Pac. 98; Northern &c. R. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151. See also Jackson v. Missouri Pac. &c. R. Co., 104 Mo. 448, 16 S. W. 413; Louisville &c. R. Co. v. Brice, 84 Ky. 298, 1 S. W. 483; Louisville &c. R. Co. v. Gower, 85 Tenn. 465, 3

in the working place or machinery, inasmuch as the loading is the use of a place or of machinery and is not in any sense the omission or failure to provide against danger in the machinery or working place. If those employed to load the car exercise care no accident can occur because of negligence in that regard, but if there is negligence on the part of employes an accident may result although the car and all appliances may be sound and free from defects. It seems obvious, therefore, that the cause of an injury where it results from improper loading is solely attributable to the act of persons in the service of the company in making use of machinery and appliances furnished them. We believe the true rule to be that where the negligence is in the use of appliances and not in the appliances themselves the employer is not liable.[9]

§ 1867 (1301a). **Other risks generally.**—It is generally held that trainmen do not assume the risk of defects in a track of which they have no knowledge and with which they have noth-

S. W. 824. See generally Atchison &c. R. Co. v. Plunkett, 25 Kans. 188; Brown v. Atchison &c. R. Co., 31 Kans. 1, 1 Pac. 605; Day v. Toledo &c. R. Co., 42 Mich. 523, 4 N. W. 203; Beesley v. Wheeler, 103 Mich. 196, 61 N. W. 648, 27 L. R. A. 266; Soderman v. Kemp, 145 N. Y. 427, 40 N. E. 212; Geoghegan v. Atlas &c. R. Co., 146 N. Y. 369, 40 N. E. 507; Lassiter v. Seaboard &c. R. Co., 150 N. Car. 483, 64 S. E. 202; Hartman v. Kloeppinger, 9 Ohio C. C. 433. So, the risk of injury from projecting loads and the like may be assumed and a recovery thus prevented. Ely v. San Antonio &c. R. Co., 15 Tex. Civ. App. 511, 40 S. W. 174; Atchison &c. R. Co. v. Plunkett, 25 Kans. 188; Northern Cent. R. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690.

[9] Callaway v. Allen, 64 Fed. 297; Pease v. Chicago &c. R. Co., 61 Wis. 163, 20 N. W. 908; Portland Gold Mining Co. v. Duke, 164 Fed. 180; Chicago &c. R. Co. v. Hamilton, 42 Ind. App. 512, 85 N. E. 1044; Duffy v. Upton, 113 Mass. 544; Bergstrom v. Staples, 82 Mich. 654, 46 N. W. 1035; Kehoe v. Allen, 92 Mich. 464, 52 N. W. 740, 31 Am. St. 608; Reading Iron Works v. Devine, 109 Pa. St. 246. But there may be a liability under the statute of the particular jurisdiction or under the peculiar circumstances of the particular case. See Pollard v. Maine &c. R. Co., 87 Maine 51, 32 Atl. 735; Corbin v. Winona &c. R. Co., 64 Minn. 185, 66 N. W. 271; McCray v. Galveston &c. R. Co., 89 Tex. 168, 34 S. W. 95; Devore v. St. Louis &c. R. Co., 86 Mo. App. 429; Ryan v. New York &c. R. Co., 88 Hun 269, 34 N. Y. S. 665.

ing to do.[10] But a conductor who continues in the service knowing that his cars are defective, or that the company has failed to furnish a sufficient number to accommodate the business, assumes the risks incident to such service.[11] And the same is held as to other trainmen who, with knowledge of the defect, continue in the service without complaint.[12] Risks from the ordinary use of snow plows and the like are assumed.[13] Where the defendant company had maintained a large number of spring rail frogs with necessary excavations thereunder in the yards in which the plaintiff, a switchman, had been working for six months it was held that it was the plaintiff's duty to take notice thereof and that he assumed the risk of having his foot caught

[10] Northern Alabama R. Co. v. Shea, 142 Ala. 119, 37 So. 796; Southern R. Co. v. Bufkins, 45 Ind. App. 80, 89 N. E. 326, 90 N. E. 98; Smith v. Chicago &c. R. Co., 82 Kans. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255 n. See also Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; Knapp v. Sioux City &c. R. Co., 71 Iowa 41, 32 N. W. 18; Evansville &c. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Montgomery v. Chicago &c. R. Co., 109 Mo. App. 88, 83 S. W. 66.

[11] Shaw v. Manchester St. R. Co., 73 N. H. 65, 58 Atl. 1073. See also for other risks assumed by conductor. Murphy v. Grand Trunk R. Co., 73 N. H. 18, 58 Atl. 835; Central &c. R. Co. v. McWhorter, 115 Ga. 476, 42 S. E. 82; Ladd v. Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730; Roberts v. Indianapolis St. R. Co., 158 Ind. 634, 64 N. E. 217.

[12] Jennett v. Louisville &c. R. Co., 162 Fed. 392; Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200 (baggageman and brakeman); McCauley v. Springfield St. R. Co., 169 Mass. 301, 47 N. E. 1006; Paris &c. R. Co. v. Stokes (Tex. Civ. App.), 41 S. W. 484. As to what is or is not deemed sufficient to charge him with knowledge, or justify the inference thereof, see Western R. Co. v. Russell, 144 Ala. 142, 39 So. 311, 113 Am. St. 24; Louisville &c. R. Co. v. Miller, 140 Ind. 685, 40 N. E. 116; Hamilton v. Michigan Cent. R. Co., 135 Mich. 95, 97 N. W. 392; Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 Atl. 528. As to where the question as to whether the defect is so bad that a person of ordinary prudence would not have taken the risk is for the jury, and when for court, see Morgan v. Ranier Beach Lumber Co., 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472 n.

[13] Brown v. Chicago &c. R. Co., 69 Iowa 161, 28 N. W. 487; Derr v. Lehigh &c. R. Co., 158 Pa. St. 365, 27 Atl. 1002, 38 Am. St. 848; Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546; Morse v. Minneapolis &c. R. Co., 30 Minn. 465, 16 N. W.

in one of the excavations.[14] So, it has been held that a section hand, knowing that trains were run at a high rate of speed at a certain place, assumed the risk incident thereto;[15] that a brakeman takes the risk of increased strain on the couplings by reason of a freight train being drawn by two engines;[16] that a brakeman takes the risk of inclement weather conditions and liability to slip or fall, under such conditions,[17] or the liability of a piece of ore to turn under his foot while passing over it in the course of his employment,[18] and that such an employe, or others, generally assume the risks of known or obvious dangers such as they ought to know.[19]

358. But see Fisher v. Oregon &c. R. Co., 22 Ore. 533, 30 Pac. 425, 16 L. R. A. 519.

[14] Riley v. Louisville &c. R. Co., 133 Fed. 904.

[15] Schulz v. Chicago &c. R. Co., 57 Minn. 271, 59 N. W. 192. But not the risk of the failure of the engineer to give him a required signal.

[16] Hawk v. Pennsylvania R. Co. (Pa.), 11 Atl. 459.

[17] Martin v. Chicago &c. R. Co. (Iowa), 87 N. W. 654, 118 Iowa 148, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. 371.

[18] East Tenn. &c. R. Co. v. Sudderth, 86 Ga. 388, 12 S. E. 682.

[19] Florence &c. R. Co. v. Whipps, 138 Fed. 13; Thompson v. Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Coyle v. Pittsburg &c. R. Co., 155 Ind. 429, 58 N. E. 545; Crane v. Chicago &c. R. Co., 124 Iowa 81, 99 N. W. 169; Mellott v. Louisville &c. R. Co., 101 Ky. 212, 40 S. W. 696; Moore v. St. Louis &c. R. Co., 115 La. Ann. 86, 38 So. 913; Baltimore &c. R. Co. v. State, 75 Md. 152, 23 Atl. 310, 32 Am. St. 372 (risk of suffocation in passing through tunnel); Cassaday v. Boston &c. R. Co., 164 Mass. 168, 41 N. E. 129; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; Bohn v. Chicago &c. R. Co., 106 Mo. 429, 17 S. W. 580; McQuigan v. Delaware &c. R. Co., 122 N. Y. 618, 26 N. E. 13 (defect in manhole cover); Ryan v. Third Ave. R. Co., 92 App. Div. 306, 86 N. Y. S. 1070; Titus v. Bradford &c. R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. 944; Dunn v. Oregon Short Line R. Co., 28 Utah 478, 80 Pac. 311; Osborne v. Lehigh &c. Co., 97 Wis. 27, 71 N. W. 814. For risks held not assumed, see Chicago &c. R. Co. v. White, 209 Ill. 124, 70 N. E. 588; Indianapolis v. Cauley, 164 Ind. 304, 73 N. E. 691; Hailey v. Texas &c. R. Co., 113 La. Ann. 533, 37 So. 131; Wagner v. Boston Elevated R. Co., 188 Mass. 437, 74 N. E. 919; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Texas &c. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79; Gulf &c. R. Co. v. Whisenhunt (Tex. Civ. App.), 81 S. W. 332; San Antonio &c. R. Co. v. Brock, 35 Tex. Civ. App. 155, 80 S. W. 422; Leach v. Oregon Short Line R. Co., 29 Utah 285, 81 Pa. 90.

§ 1868 (1302). Dangerous service.—Although the service may be dangerous the employe assumes all the ordinary hazards of such service.[20] The right of an employe to recover damages from the employer for personal injuries does not depend upon the dangerous character of the service he enters but depends upon the failure of the employer to exercise ordinary care.[21] No matter how hazardous the nature of the service all risk from the perils ordinarily incident to it are assumed by the person who voluntarily enters it.[22] An employe who has knowledge of the appliances in use by the employer assumes the risk ordinarily incident to their use and cannot rightfully ask that the employer shall change them although their use may subject the employe to danger.[23] Where the nature of the work upon which the employe is engaged in such as of itself makes the working place unsafe the employe assumes the risk.[24] The test of duty is not

[20] Finalyson v. Utica &c. R. Co., 67 Fed. 507; King v. Morgan, 109 Fed. 446; Clark v. Liston, 54 Ill. App. 578; Chicago &c. R. Co. v. Wild, 109 Ill. App. 38; Connelly v. Hamilton &c. R. Co., 163 Mass. 156, 39 N. E. 787; Watson v. Kansas &c. Co., 52 Mo. App. 366. See also Clarke v. Holmes, 7 Hurlst. & N. 943, 31 L. J. Exch. (N. S.) 356; Smith v. Baker (1891), A. C. 325, 356, 10 L. J. Q. B. (N. S) 683, 65 L. T. N. S. 467; Reese v. Wheeling &c. R. Co., 42 W. Va. 333, 26 S. E. 204; Boldt v. Pennsylvania R. Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. ed. 385.

[21] See Weed v. Chicago &c. R. Co., 5 Nebr. (Unof.) 623, 99 N. W. 827.

[22] Northern &c. R. Co. v. Husson, 101 Pa. St. 1, 47 Am. Rep. 690; Sweet v. Ohio &c. Co., 78 Wis. 127, 47 N. W. 182, 9 L. R. A. 861; Coombs v. New Bedford &c. R. Co., 102 Mass. 572, 3 Am. Rep. 506; Swoboda v. Ward, 40 Mich. 420.

[23] Hodgkins v. Railroad Co., 119 Mass. 419 (quoted from in Southern Pacific R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530), 38 L. ed. 391; Sweeney v. Berlin &c. Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722 and note; Walsh v. Whiteley, 21 Q. B. Div. 371; Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Sullivan v. India &c. Co., 113 Mass. 398.

[24] Gulf &c. R. Co. v. Jackson, 65 Fed. 48. In the case cited it was said: "It frequently happens that men are employed to tear down buildings or other structures or to repair them after they have become insecure, or it may be that the work undertaken by the employe is of a kind that is calculated to render the premises or place of performance for the time being to some extent insecure. In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place

the hazardous nature of the service in which the servant engages, for as we have said, the servant assumes all ordinary risks incident to the service no matter how hazardous it may be. If the care exercised by the employer is ordinary care, considering the nature of the service, then the duty of the master is performed although the service may be one of the most hazardous nature.[25]

§ 1869 (1303). Performing work outside of scope of the contract of employment—Permissive privilege.—In order to make a party liable in the capacity of an employer for injuries resulting from negligence the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employe.[26] If the time when and place where the injury is

where he is required to exercise his calling." The court cited Carlson v. Oregon &c. R. Co., 21 Ore. 450, 28 Pac. 497; Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. ed. 440. In the case last above cited the court said: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the performance of that work by them and their fellows." See also Broderick v. St. Paul City R. Co., 74 Minn. 163, 77 N. W. 28; Kletschka v. Minneapolis &c. R. Co., 80 Minn. 288, 83 N. W. 133; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Stroble v. Chicago &c. R. Co., 70 Iowa 555, 31 N. W. 63, 59 Am. Rep. 456; Baltimore &c. R. Co. v. Hunsucker, 33 Ind. App. 27, 70 N. E. 556. In Kellyville Coal Co. v. Bruzas, 223 Ill. 595, 79 N. E. 309, it is held that the rule requiring the master to use reasonable care to furnish a reasonably safe place to work does not apply as to those whose duty it is to make dangerous places safe. See also Tennessee Coal &c. R. Co. v. King, 161 Ala. 345, 50 So. 75; McPherson v. Great Northern R. Co., 140 Wis. 473, 122 N. W. 1022.

[25] Stewart v. Ohio River &c. R. Co., 40 W. Va. 188, 20 S. E. 922. But it is held to be the duty of the employer to adopt reasonable precautions under the circumstances for the safety of the employes. St. Louis &c. R. Co. v. Inman, 81 Ark. 591, 99 S. W. 832; 4 Thomp. Neg. (2d ed.) § 4615.

[26] Ante, § 1821. The rule is that one who enjoys a permissive privilege does so with all the concomitant perils. The text is cited in Louisville &c. R. Co. v. Gillen, 166 Ind. 321, 76 N. E. 1058, 1059, where, however, the question was as to whether the master was liable for the acts of a servant not shown to

received are not within the scope of the contract of employment the relation of master and servant cannot be justly said to exist, and no recovery can be had against a defendant in the character or capacity of a master or employer. We do not say that where there is negligence on one side and freedom from negligence on the other there may not be a recovery if legal grounds for a recovery exist, but we do say that even though there may be negligence on the one side and none on the other there can in no event be a recovery upon the theory that there was a breach of the specific duty which an employer owes to the employe unless it is affirmatively shown that the injury was received while the plaintiff was performing service for the master under the contract of employment. That there is a breach of some duty does not warrant a finding against a party in the capacity of an employer. Where one employed to do a designated kind of work or to work at a particular place voluntarily undertakes to do some other work or voluntarily goes to a place different from that assigned him by the contract of employment he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury.[27] The fact that the plaintiff is at some times and some

be in the line of his duty. The rule in the text is also stated, and the text cited, in Green v. Brainerd &c. R. Co., 85 Minn. 318, 88 N. W. 974, 976.

[27] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Kentucky &c. R. Co. v. Jamison, 14 Ky. L. 345, 20 S. W. 258; Chesapeake &c. Ry. Co. v. Barnes, 132 Ky. 728, 117 S. W. 261; Ball v. Vicksburg &c. R. Co., 123 La. 7, 48 So. 565; Wise v. Ackerman, 76 Md. 375, 25 Atl. 424; Knox v. Pioneer &c. Co., 90 Tenn. 546, 18 S. W. 255. See also St. Louis &c. Ry. Co. v. Schultz, 115 Ark. 350, 171 S. W. 876, Ann. Cas. 1916E, 317 n.; Alabama &c. R. Co. v. Hall, 105 Ala. 599, 17 So. 176; Seers v. Central R. &c. Co., 53 Ga. 630; Central R. &c. Co. v. Chapman, 96 Ga. 769, 22 S. E. 273; Chattanooga &c. R. Co. v. Myers, 112 Ga. 237, 37 S. E. 439 (citing text); East St. Louis &c. R. Co. v. Craven, 52 Ill. App. 415; Chicago Terminal &c. R. Co. v. Berkowitz, 137 Ill. App. 95; Bequette v. St. Louis &c. R. Co., 86 Mo. App. 601; Young v. Boston &c. R. Co., 69 N. H. 634, 41 Atl. 268; Texas &c. R. Co. v. Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1001. But compare Chicago &c. R. Co. v. Snedaker, 122 Ill. App. 262; Terre Haute &c. R. Co. v. Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531.

places the employe of a railroad company does not entitle him to hold the company liable in the capacity of an employer when he goes into a place to which the duties of his service do not require or authorize him to go.[28] If he goes into a place on the master's premises when he has no duty whatever at such a place and without invitation, he enjoys a mere permissive privilege and, at best, is a mere licensee, and if there be any liability to him it is only for a breach of the duty which an owner of premises owes to a licensee.[29] Upon the principle that an employer is not liable to an employe who voluntarily does work outside of the duties of the service required of him by his contract of service it is held that there is no liability to an employe who works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer.[30]

[28] Evans v. American &c. Co., 42 Fed. 519; Brown v. Byroads, 47 Ind. 435; Pittsburg &c. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Baltimore &c. R. Co. v. State, 33 Md. 542; Church v. Chicago &c. R. Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861 and note; Green v. Brainerd &c. Ry. Co., 85 Minn. 318, 88 N. W. 974, 976 (citing text); Cowhill v. Roberts, 71 Hun 127, 24 N. Y. 533; Baird v. Pettit, 70 Pa. St. 477; Washburn v. Nashville &c. R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Sullivan v. Waters, 14 Irish N. C. L. R. 460.

[29] Chattanooga &c. R. Co. v. Myers, 112 Ga. 237, 37 S. E. 439, 440 (citing text); Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051; Wright v. Rawson, 52 Iowa 329, 35 Am. Rep. 275; Baker v. Chicago &c. R. Co., 95 Iowa 163, 63 N. W. 667; Gillshannon v. Stony Brook &c. R. Co., 10 Cush. (Mass.) 228; Connell v. New York &c. R. Co., 213 N. Y. 352, 107 N. E. 568. See also Mitchell v. Chicago &c. R. Co., 105 Ark. 364, 151 S. W. 520; Carey v. Chicago &c. R. Co., 84 Kans. 274, 114 Pac. 197, 46 L. R. A. (N. S.) 877 n.; Glover v. Chicago &c. R. Co., 54 Mont. 446, 171 Pac. 278; Cunningham v. Philadelphia &c. R. Co., 247 Pa. 134, 94 Atl. 467, ante § 1800.

[30] Central &c. R. Co. v. Chapman, 96 Ga. 769, 22 S. E. 273; Felch v. Allen, 98 Mass. 572; Leistritz v. American &c. Co., 154 Mass. 382, 28 N. E. 294; Jayne v. Sebewaing &c. Co., 108 Mich. 242, 65 N. W. 972; White v. Wittemann &c. Co., 131 N. Y. 631, 30 N. E. 236; Guenther v. Lockhart, 61 Hun 624, 16 N. Y. S. 717; Teetsil v. Summons, 88 Hun 621, 34 N. Y. S. 972. See Houston &c. R. Co. v. Myers, 55 Tex. 110; White v. Sharp, 27 Hun (N. Y.) 94. The case of Graham v. Chicago &c. R. Co., 62 Fed. 896, illustrates the general rule that where the employe makes use of an appliance for a purpose different from that for which it was intended he can not hold the employer responsible.

If the employe is, at the time of the injury, reasonably within the line of his duty he is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place or appliances,[31] but he cannot be justly said to be within the line of his duty when he is doing an act solely for his own convenience.[32] Some of the cases rest the rule that the master is not liable for injuries to a servant where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go upon the ground of contributory negligence.[33] but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employe goes solely for his own convenience.

[31] Walbert v. Trexler, 156 Pa. St. 112, 27 Atl. 65; Evansville &c. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345; McCloherty v. Gale &c. Co., 19 Ont. App. 117. See Parkinson Sugar Co. v. Riley, 50 Kans. 401, 31 Pac. 1090, 34 Am. St. 123; Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315. See McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. 181; Ewald v. Chicago &c. R. Co., 70 Wis. 420, 36 N. W. 12 and 591, 5 Am. St. 178; Patnode v. Warren &c. Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. 275; Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051. The opinion in the case last cited contains some statements that are clearly erroneous, for where an employe voluntarily and for his own convenience goes into a place of danger he is not in the line of his duty, for to such a place the contract of employment does not extend.

[32] Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124 and note; Knox v. Pioneer &c. Co., 90 Tenn. 546, 18 S. W. 255; Wink v. Weiler, 41 Ill. App. 336; Hurst v. Chicago &c. R. Co., 49 Iowa 76; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. 602. See also Louisville &c. R. Co. v. Jolly's Admx., 28 Ky. L. 989, 90 S. W. 977. See Baird v. Pettit, 70 Pa. St. 477, and authorities note; also Olson v. Minneapolis &c. R. Co., 76 Minn. 149, 78 N. W. 975, 48 L. R. A. 796 and note.

[33] Bunt v. Sierra &c. Co., 24 Fed. 847; Sears v. Central &c. R. Co., 53 Ga. 630; Pennsylvania Co. v. Lynch, 90 Ill. 333; Union Pac. R. Co. v. Estes, 37 Kans. 715, 16 Pac. 131; Rains v. St. Louis &c. R. Co., 71 Mo. 164, 36 Am. Rep. 459; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Sammon v. New York &c. Co., 38 N. Y. Sup. Ct. 414; Pittsburg &c. R. Co. v. Sentmeier, 92 Pa. St. 276, 37 Am. Rep. 684. It is doubtless true that where an employe unnecessarily goes into a place of danger he is guilty of negligence, but even if the place into which he goes for his own convenience and not to serve his employer

§ 1870 (1303a). Employes going to and from work.—It has been held that an employe who crosses tracks or the like on the company's premises in going to and from his work where he has full knowledge assumes the risk.[34] There is some conflict as to whether an employe carried to and from his work on a car or the like is a passenger and as to the duty of the company to him on the one hand and the risk assumed by him, on the other. The weight of authority, however, as well as the better reason, is clearly to the effect that where he is so carried he is not a passenger but is, ordinarily, to be considered as an employe and a fellow servant of the employes upon the car transporting him.[35]

is not dangerous he can not recover for he is not there as an employe, so that the specific duty of an employer to an employe is not owing to him.

[34] O'Neil v. Pittsburg &c. R. Co., 130 Fed. 204; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90. And is a fellow servant. Ewald v. Chicago &c. R. Co., 70 Wis. 420, 36 N. W. 12, 5 Am. St. 178.

[35] Tomlinson v. Chicago &c. R. Co., 97 Fed. 252; Dayton Coal &c. Co. v. Dodd, 188 Fed. 597, 37 L. R. A. (N. S.) 456; Louisville &c. R. Co. v. Stuber, 108 Fed. 934, 54 L. R. A. 696; Birmingham Ry. &c. Co. v. Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A. (N. S.) 717 (citing § 2388, post); Indianapolis &c. R. Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. 185; Bowles v. Indiana R. Co., 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. 279, and cases cited; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Gillshannon v. Stony Brook &c. R. Corp., 10 Cush. (Mass.) 228; St. Clair v. St. Louis &c. R. Co., 122 Mo. App. 519, 99 S. W. 775, 777 (citing § 2387, post); Vick v. New York &c. R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Ryan v. Cumberland &c. R. Co., 23 Pa. St. 384; Iannone v. New York &c. R. Co., 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. 812; Sanderson v. Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 910, 88 Am. St. 841; Coldrick v. Partridge, (1909) 1 K. B. 530, 16 Ann. Cas. 283. See also McQueen v. Central Branch &c. R. Co., 30 Kans. 689, 1 Pac. 139; Chicago, M. & St. P. R. Co. v. Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. ed. 747; Arkadelphia Lumber Co. v. Smith, 78 Ark. 505, 95 S. W. 800; Avend v. Terre Haute R. Co., 111 Ill. 203; Chicago Terminal &c. R. Co. v. O'Donnell, 114 Ill. App. 345, affirmed in 213 Ill. 545, 72 N. E. 1133; Wabash R. Co. v. Erb, 36 Ind. App. 650, 73 N. E. 939; Southern Ind. R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097; Kendall Lumber Co. v. State, 132 Md. 93, 103 Atl. 141; O'Brien v. Boston &c. R. Co., 138 Mass. 387, 52 Am. Rep. 279; Kumler v. Railroad Co., 33 Ohio St. 150; International &c. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.

But it may be otherwise if he is being carried in pursuance of his own business, and some authorities seem to hold that he is not to be treated as an employe, in any event, before or after working hours and when not engaged at the time in the master's business.[36] In a recent case an employe who had boarded a car, after cleaning a switch, to proceed to another switch to perform a similar task, and had given the conductor an employe's ticket, furnished by the company, was injured by a collision between the car on which he was riding and another car of the defendant company. He was nonsuited below on the ground that the negligence complained of was that of a fellow servant. The court, on appeal, held that this was correct, and that he was an employe of the defendant company and could not recover nothwithstanding he was not at the time actually engaged in work, and notwithstanding it was Sunday and the statute made it an offense to do any such work or labor on Sunday.[37]

§ 1871 (1304). Work outside of the ordinary line of duty—Special orders.—There is much conflict upon the question of the liability of the employer in cases where the employe is required by the employer to perform work outside of the line of duty which he was engaged to perform. Courts of high authority hold that the fact that a servant is required to perform service outside of his line of duty does not, of itself, make the employer liable to the employe for injuries received while engaged in such work, for the reason that he is held to assume the risks of such serv-

[36] See McNulty v. Pennsylvania R. Co., 182 Pa. St. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. 721; Dickinson v. West End St. R. Co., 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. 284; Herbert v. Portland R. Co., 103 Maine 315, 69 Atl. 266, 125 Am. St. 297, 13 Ann. Cas. 886; State v. Western Md. R. Co., 63 Md. 433; Doyle v. Fitchburg &c. R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335; Albion Lumber Co. v. De Nobra, 72 Fed. 739. And where he is riding on transportation furnished him as part of his salary he is held to be a passenger. Indianapolis &c. Trac. Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068. See also Harris v. City &c. R. Co., 69 Va. 65, 70 S. E. 895, Ann. Cas. 1912D, 59, and cases there cited.

[37] Shannon v. Union R. Co., 27 R. I. 475, 63 Atl. 488.

ice.[38] Other courts hold that if the employer requires the servant to do work outside the scope of his employment, and the servant is injured while engaged in such work, the master is liable.[39] Still other cases hold that where there is a special order the employe assumes only such risks of the position to which he is ordered as are obvious.[40] It seems to us that the employer cannot justly be held liable upon the mere fact that he orders the

[38] Gilmore v. Northern Pac. R. Co., 18 Fed. 866; Hogan v. Northern Pac. R. Co., 53 Fed. 519 (distinguishing Miller v. Union Pac. R. Co., 17 Fed. 67); Alabama &c. R. Co. v. Hall, 105 Ala. 599, 17 So. 176; Leary v. Boston R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733, and note; Chicago &c. R. Co. v. Bayfield, 37 Mich. 205; Jones v. Lake Shore R. Co., 49 Mich. 573, 14 N. W. 551; Millar v. Madison Co., 130 Mo. 57, 31 S. W. 574; Brown v. Oregon &c. R. Co., 24 Ore. 315, 33 Pac. 557; Cole v. Chicago &c. R. Co., 71 Wis. 114, 37 N. W. 84, 5 Am. St. 201. See Dougherty v. West Superior &c. R. Co., 88 Wis. 343, 60 N. W. 274, note in 30 L. R. A. (N. S.) 436; Union Pac. R. Co. v. Marone, 246 Fed. 916; Kinder v. Boomer Coal &c. Co., 82 W. Va. 32, 95 S. E. 580.

[39] Gilmore v. Union Pac. R. Co., 18 Fed. 866, 870; Cincinnati &c. R. Co. v. Madden, 134 Ind. 462, 34 N. E. 227. See Strong v. Iowa &c. R. Co., 14 Iowa 380, 62 N. W. 799. See also Republic &c. Co. v. Ohler, 161 Ind. 393, 68 N. E. 901; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 196; McGowan v. St. Louis &c. R. Co., 61 Mo. 528. But this rule is not applicable in all cases. Morewood Co. v. Smith, 25 Ind. App. 264, 57 N. E. 199; Stuart v. New Albany &c. Co., 15 Ind. App. 184, 43 N. E. 961.

[40] Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700; Osborn v. Adams Brick Co., 52 Ind. App. 175, 99 N. E. 530, 100 N. E. 472; National Fire Proofing Co. v. Smith, 55 Ind. App. 124, 99 N. E. 829; Fox v. Chicago &c. R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289, 53 Am. & Eng. R. Cas. 430; Walker v. Lake Shore &c. R. Co., 104 Mich. 606, 62 N. W. 1032; Halliburton v. Wabash R. Co., 58 Mo. App. 27. A statement frequently found is that the employe does not assume the additional risk in such cases unless the danger is so obvious that an ordinarily prudent man would not encounter it. Nall v. Louisville &c. R. Co., 129 Ind. 260, 28 N. E. 183; Offut v. Columbia Exposition, 175 Ill. 472, 51 N. E. 651; Gundlach v. Scott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. 348; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; St. Louis &c. R. Co. v. Morris, 76 Kans. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100, 123 Am. St. 169; Faulkner v. Mammoth Min. Co., 23 Utah 437, 66 Pac. 799; Stephens v. Hannibal &c. R. Co., 86 Mo. 221, 96 Mo. 207, 9 S. W. 589, 9 Am. St. 336. See Christianson v. Pacific &c. Co., 27 Wash. 582, 63 Pac. 191; Illinois Cent. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; Consolidation Coal Co. v. Deskins, 178 Ky. 663, 199 S. W. 779; English v. Chicago

servant to do work outside of the scope of his employment, but that if the employer knows, or is bound to know, that such work is of a different nature and of a more dangerous character than that which the servant was engaged to perform, and that the servant has not such knowledge, experience or skill as enables him to safely perform the work, he, the employer, is liable to the servant for injuries sustained if there is no contributory negligence.[41] If, however, the servant undertakes such service and has knowledge of its dangers, or is chargeable with knowledge of such dangers, and there is no negligence on the part of the employer as to giving warning, or the like, we cannot perceive upon what principle he can be held liable, although he gave a special order.[42] It is held by some of the courts that although the danger

&c. R. Co., 24 Fed. 906; Worthington v. Goforth, 124 Ala. 656, 26 So. 531; Southern R. Co. v. Shields, 121 Ala. 460, 25 So. 811, 77 Am. St. 66, note in 99 Am. St. 896, et seq.

[41] This is the general rule where there is an assurance of safety by the master under such circumstances that the employe has a right to rely on it, or reason to subordinate his judgment to it. Louisville &c. R. Co. v. Handley, 174 Ala. 593, 56 So. 539; National Fire Proofing Co. v. Andrews, 158 Fed. 294; Ryan v. Los Angeles &c. Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Smith v. Southern R. Co., 8 Ga. App. 822, 70 S. E. 192; Hass v. Chicago &c. R. Co., 97 Ill. App. 624; Cincinnati &c. R. Co. v. Madden, 132 Ind. 462, 34 N. E. 227; Oolitic Stone Co. v. Ridge, 174 Ind. 558, 91 N. E. 944; Cleveland &c. R. Co. v. Patterson, 37 Ind. App. 617, 75 N. E. 857; Wolfe v. Guner (Ind. App.), 119 N. E. 839; Flickner v. Lambert, 36 Ind. App. 524, 74 N. E. 263; St. Louis & S. F. R. Co. v. Morris, 76 Kans. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100, 123 Am. St. 169, and cases there cited; Stucke v. Orleans R. Co., 50 La. Ann. 172, 23 So. 342; McDowell v. New York &c. R. Co., 192 Mass. 538, 78 N. E. 548, 7 Ann. Cas. 690; Rahm v. Chicago &c. R. Co., 129 Mo. App. 679, 108 S. W. 570; Chicago &c. R. Co. v. McCarty, 49 Nebr. 475, 68 N. W. 633; Eichholz v. Niagara Falls &c. Co., 68 App. Div. 441, 73 N. Y. S. 842, affirmed in 174 N. Y. 519, 66 N. E. 1107; Lyon v. Charleston &c. R. Co., 77 S. Car. 328, 56 S. E. 12; Fort Worth &c. R. Co. v. Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210; Brandon v. Texarkana &c. R. Co. (Tex. Civ. App.), 113 S. W. 968.

[42] Thompson v. Chicago &c. Co., 14 Fed. 564; Southern R. Co. v. Logan, 138 Fed. 725; Chicago &c. R. Co. v. Crotty, 141 Fed. 913, 4 L. R. A. (N. S.) 832; Mary Lee &c. Co. v. Chambliss, 97 Ala. 171, 11 So. 897, 53 Am. & Eng. R. Cas. 254; Lowe Mfg. Co. v. Payne, 167

of obeying an order is obvious, yet if the employe is compelled to obey by fear of losing his place, it will not preclude a recovery,[43] but many other cases hold a contrary doctrine.[44] The fact that an employe is acting under a positive order does not

Ala. 245, 52 So. 447, 30 L. R. A. (N. S.) 436n; Griffith v. Lexington &c. R. Co., 124 Ga. 553, 53 S. E. 97, 4 L. R. A. (N. S.) 854; Hanson v. Hammiel, 107 Iowa 171, 77 N. W. 839; Lindsay v. Hollerback &c. Contract Co., 29 Ky. L. 68, 92 S. W. 294, 4 L. R. A. (N. S.) 830; Baltimore &c. R. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Leary v. Boston &c. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733, and note; O'Hare v. Cocheco &c. Co., 71 N. H. 105, 51 Atl. 257, 93 Am. St. 499; Cole v. Chicago &c. R. Co., 71 Wis. 114, 37 N. W. 84, 5 Am. St. 201; Paule v. Florence &c. Co., 80 Wis. 350, 50 N. W. 189. See also Colorado &c. R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 14 Ann. Cas. 816; Barrett Mfg. Co. v. Marsh, 137 Ill. App. 110; Bradshaw v. Louisville &c. R. Co. (Ky.), 14 Ky. L. 688, 21 S. W. 346; Stenvog v. Minnesota &c. Ry. Co., 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362, 17 Ann. Cas. 240; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Mann v. Oriental &c. Works, 11 R. I. 152, note in 4 L. R. A. (N. S.) 830.

[43] Fogus v. Chicago &c. R. Co., 50 Mo. App. 250. See also East Tenn. &c. R. Co. v. Duffield, 12 Lea (Tenn.) 63, 47 Am. R. 319; Citizens' Gas &c. Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310; Chicago &c. R. Co. v. McCarty, 49 Nebr. 475, 68 N. W. 633.

[44] Griffith v. Lexington &c. R. Co., 124 Ga. 533, 53 S. E. 97, 4 L. R. A. (N. S.) 854; Atchison v. Schroeder, 47 Kans. 315, 27 Pac. 965; Leary v. Boston &c. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. R. 733 and note; Burke v. Davis, 191 Mass. 20, 76 N. E. 1039, 4 L. R. A. (N. S.) 971, 114 Am. St. 591; Prentiss v. Kent &c. Co., 63 Mich. 478, 30 N. W. 109; Sweeney v. Berlin &c. R. Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722 and note. See Wiggins Ferry Co. v. Heilig, 43 Ill. App. 238; Dickenson v. Vernon, 77 Conn. 537, 60 Atl. 270; Worlds v. Georgia R. Co., 99 Ga. 283, 25 S. E. 646; Southern Kans. R. Co. v. Moore, 49 Kans. 616, 31 Pac. 138; Wormell v. Maine Cent. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321; Lamson v. Am. Axe &c. Co., 177 Mass. 144, 58 N. E. 585, 83 Am. St. 267; Lee v. Northern Pac. R. Co., 39 Wash. 388, 81 Pac. 834; Cole v. Chicago &c. R. Co., 71 Wis. 114, 37 N. W. 84, 5 Am. St. 201; Dougherty v. West Superior Iron Co., 88 Wis. 343, 60 N. W. 274; Woodley v. Metropolitan R. Co., 46 L. J. Exch. 521. This is certainly the better doctrine where the known risk is such that no ordinarily prudent man would undertake it. Membery v. Great Western R. Co., L. R., (1889) 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563. But compare Sanders v. Barker (1890), 6 Times L. R. 324.

absolve him from the duty to exercise ordinary care,[45] but we suppose that the nature of the order may, of itself, be important in determining whether there was or was not contributory negligence, and as already intimated, there are cases in which it may amount to an assurance of safety.[46]

§ 1872 (1305). **Volunteers.**—A person cannot make himself the employe of a railroad company by his own act, for the relation of master and servant cannot exist in such a sense as to create the duty of employer to employe without the express or implied assent of both parties. No one can intrude himself into the service of another person independently of the latter person's consent or acquiescence. It follows from this that one who without any employment, or any request, express or implied, from a railroad company assumes to enter the service of the company cannot create the relation of master and servant. If that relation does not exist one who assumes to perform service for the company must be regarded as a mere volunteer without any right whatever to insist that the company owes him a duty as master or employer. Duty cannot exist where there is no relation between the parties creating it. The overwhelming weight of authority sustains the doctrine that a volunteer cannot charge a railroad company with the duty of an employer.[47] If there is

[45] Smith v. St. Paul &c. R. Co., 51 Minn. 86, 52 N. W. 1068. See also Whatley v. Macon &c. R. Co., 104 Ga. 764, 30 S. E. 1003; Chicago &c. R. Co. v. Sanders, 42 Ind. App. 585, 86 N. E. 430; Mason v. Post, 105 Va. 494, 54 S. E. 311, 11 L. R. A. (N. S.) 1038. But it may often make the case one for the jury.

[46] St. Louis &c. R. Co. v. Mathis, 76 Ark. 184, 91 S. W. 763, 113 Am. St. 85. See Oolitic Stone Co. v. Ridge, 174 Ind. 558, 91 N. E. 944; Mayer v. Detroit &c. R. Co., 152 Mich. 276, 116 N. W. 429; Hughes v. Fayette &c. Co., 214 Pa. St. 282, 63 Atl. 692; Wilson v. Southern R. Co., 73 S. Car. 481, 53 S. E. 968; Lowe v. Southern R. Co., 85 S. Car. 363, 67 S. E. 460, 137 Am. St. 904; Houston &c. R. Co. v. Malloy, 54 Tex. Civ. App. 490, 118 S. W. 721, notes in 30 L. R. A. (N. S.) 442, 453.

[47] McDaniel v. Highland &c. R. Co., 90 Ala. 64, 8 So. 41; Sparks v. East Tennessee R. Co., 82 Ga. 156, 8 S. E. 424; Atlanta &c. R. Co. v. West, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. 179; Central of Georgia R. Co. v. Mullins, 7 Ga. App. 381, 66 S. E. 1028; Everhart v. Terre Haute &c. R. Co., 78 Ind. 292, 41 Am. Rep. 567; At-

authority to employ the persons who undertake to render service then the general rule will not apply.[48] Ordinarily, trainmen have no authority to employ servants for the company.[49] There may be cases where the circumstances are such as to confer

chison &c. R. Co. v. Lindley, 42 Kans. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. 515; Clarke v. Louisville &c. R. Co., 33 Ky. L. 797, 111 S. W. 344; Osborne v. Knox &c. R. Co., 68 Maine 49, 28 Am. Rep. 16; Keating v. Michigan &c. R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. 328; Church v. Chicago &c. R. Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861 and note; Evarts v. St. Paul &c. R. Co., 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663, 45 Am. St. 460; Wagen v. Minneapolis &c. R. Co., 80 Minn. 92, 82 N. W. 1107; New Orleans &c. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Yazoo &c. R. Co. v. Stansberry, 97 Miss. 831, 53 So. 389; Sherman v. Hannibal & St. Joseph &c. R. Co., 72 Mo. 62, 37 Am. Rep. 423; Vasson v. Atlantic &c. R. Co., 142 N. Car. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, 9 Ann. Cas. 635; Wischam v. Richards, 136 Pa. St. 109, 20 Atl. 532, 10 L. R. A. 97, 20 Am. St. 900; Flower v. Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; Texas &c. R. Co. v. Skinner, 4 Tex. 661, 23 S. W. 1001; Mayton v. Texas &c. R. Co., 63 Tex. 77, 51 Am. Rep. 637; Gulf &c. R. Co. v. Dawkins, 77 Tex. 288, 13 S. W. 982, 3 Am. R. & Corp. 75; Mickelsen v. New East &c. R. Co., 23 Utah 42, 64 Pac. 463. But see Althorf v. Wolfe, 22 N. Y. 355; Street R. Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803; Bonner v. Bryant, 79 Tex. 540, 15 S. W. 491, 23 Am. St. 361; Johnson v. Ashland &c. Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. 243. In Rhodes v. Georgia &c. R. Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. 362, the general rule is recognized but held, erroneously as we think, not to apply to a lad thirteen years of age. In a more recent case this section is cited by the same court and it is said that our criticism upon the case last above cited is just. Atlanta &c. R. Co. v. West, 121 Ga. 641, 49 S. E. 711, 713, 67 L. R. A. 701, 704, 104 Am. St. 179, 184.

[48] Central &c. R. Co. v. Texas &c. R. Co., 32 Fed. 448; Sloan v. Central &c. R. Co., 62 Iowa 728, 16 N. W. 331; Georgia &c. R. Co. v. Propst, 83 Ala. 518, 3 So. 764; Fox v. Chicago &c. R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289; Bradley v. New York &c. R. Co., 62 N. Y. 99. See also Hitchcock v. Arctic Creamery Co., 170 Iowa 352, 150 N. W. 727; Feneff v. Boston &c. R. Co., 196 Mass. 575, 82 N. E. 705; Maxson v. J. I. Case Threshing Co., 81 Nebr. 546, 116 N. W. 281, 16 L. R. A. (N. S.) 963 n; St. Louis &c. R. Co. v. Bagwell, 33 Okla. 189, 124 Pac. 320, 40 L. R. A. (N. S.) 1180 n.

[49] In Vassor v. Atlantic &c. R. Co., 142 N. Car. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, 9 Ann. Cas. 535; the plaintiff boarded the defendant's local freight train, and asked the conductor in charge if

authority but such cases are exceedingly rare. Some of the cases hold that where there is mutuality, that is, where the person who assumes to act for another has business with the person for whom he assumes to act, or an interest in the matter so as to make him a licensee with interest, the rule in regard to volunteers does not apply.[50] We very much incline to doubt the soundness of some of the cases referred to; at all events we do not believe it possible for one person to make himself the servant of another, nor do we believe that it can be held that a railroad company invites one for whom it undertakes to transport goods to

he could come back with him the next day on his train, and the conductor replied that he could, and that he was to help unload and load freight. Plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter. It was held that the conductor had no authority to employ plaintiff as a servant or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty owing to a passenger or employe, and the plaintiff could not recover as there was no evidence of wanton or wilful injury. It was also held that the fact that the company several months afterwards gave the plaintiff a pass to return to his home and designated him in such pass as an "injured employe" was inadmissible to show a ratification of the alleged employment by the conductor. See also Cooper v. Lake Erie &c. R. Co., 136 Ind. 366, 36 N. E. 272; Clarke v. Louisville &c. R. Co., 33 Ky. L. 797, 117 S. W. 344; Powers v. Boston &c. R. Co., 153 Mass. 188, 26 N. E. 446; Eaton v. Delaware &c. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Taylor v. Baltimore &c. R. Co., 108 Va. 817, 62 S. E. 798; Hendrickson v. Wisconsin &c. R. Co., 143 Wis. 179, 122 N. W. 758. But see in case of emergency, Sloan v. Railway, 62 Iowa 736, 16 N. W. 331; Georgia Pac. R. Co. v. Probst, 83 Ala. 525, 3 So. 764; and compare Newport News Ry. Co. v. Carroll (Ky.), 31 S. W. 132; Hendrickson v. Louisville &c. R. Co., 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311 (liability of company to father of minor employed by conductor to do work intrinsically dangerous); Troutman's Admx. v. Louisville &c. R. Co., 179 Ky. 145, 200 S. W. 488.

[50] Wright v. London &c. R. Co., L. R. 1. Q. B. Div. 252; Holmes v. North Eastern &c. R. Co., L. R. 4 Exch. 254, L. R. 6 Exch. 123; Street Railway v. Bolton, 43 Ohio 224, 54 Am. Rep. 803; Welch v. Maine Central &c. R. Co., 86 Maine 552, 30 Atl. 116, 25 L. R. A. 658, 10 Am. R. & Corp. 293; Kelly v. Lyra, 103 Minn. 176, 114 N. W. 750, 17 L. R. A. (N. S.) 334 n.

assume the hazards of performing service for it.[51] Certainly it is going to great lengths to hold that a person without knowledge or experience may intrude himself into a position of danger such as are all positions which are connected with the movement of railroad trains and the like and thus create a duty to protect him in the position of danger. Such a person cannot be presumed to have knowledge of the meaning of signals, the mode of shunting cars or like matters, and it is putting an unjust and unreasonable burden on the company to hold that it owes him a duty as an employer. We do not say, nor mean to say, that under such circumstances no duty at all is owing from the company; on the contrary, we say that there is a duty, but that it is not that of an employer. The duty and the only duty, as a rule, is to refrain from doing the intruder any wilful injury,[52] or to exercise reasonable or ordinary care not to injure him when he is discovered, or, perhaps, ought to have been discovered, in peril. But in a recent case it was held that where the wife of a defendant's station agent was accustomed to assist her husband with the work in the station office, and this was known to the officers of the company in charge of the division, and not objected to by them, she was a licensee, and the defendant was liable for injuries to her while so in the office caused by the derailment of a train while running at a dangerous speed over a defective track.[53]

§ 1873 (1306). **Concurrent negligence.**—When a railroad company is guilty of a negligent breach of the duty of an employer and such breach of duty is the proximate cause of an injury to an employe the company is not exonerated from liability, although the negligence of a coemploye may have concurred with that of the company in producing the injury.[54] This rule is well estab-

[51] Potter v. Faulkner, 1 Best & S. 800; Degg v. Midland R. Co., 1 H. & N. 773; Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720; Welch v. Maine &c. R. Co., 86 Maine 552, 30 Atl. 116, 25 L. R. A. 658.

[52] Evarts v. St. Paul &c. R. Co., 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663 and note, 45 Am. St. 460. We are not here referring to the duty of those coming to do business with the company, or otherwise invited, and not intermeddling as volunteers in the work of the company.

[53] Croft v. Chicago &c. R. Co., 132 Iowa 687, 108 N. W. 1053. See also Owens v. Yazoo &c. R. Co., 94 Miss. 378, 47 So. 518, 136 Am. St. 579.

[54] Grand Trunk &c. R. Co. v

lished and has been applied in railroad cases under various conditions and in instances too numerous to specify.[55] Even if the employer is negligent, however, the injured employe cannot recover unless the negligence of the employer was a proximate cause of the injury, for if the negligence of another employe was the sole proximate cause of the injury there is not concurring negligence in such a sense as to impose a liability upon the employer.[56] The general rule is affirmed with substantial agreement

Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. ed. 266; Standard Oil Co. v. Brown, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. ed. 939, 20 Ann. Cas. 980; Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; Cincinnati &c. R. Co. v. Clark, 57 Fed. 125; Farmers' &c. Co. v. Toledo &c. R. Co., 67 Fed. 73; Mexican &c. R. Co. v. Glover, 107 Fed. 356; Shugart v. Atlanta &c. R. Co., 133 Fed. 505; Chicago &c. R. Co. v. Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. 117; Ohio &c. R. Co. v. Stein, 140 Ind. 61, 39 N. E. 246; Louisville &c. R. Co. v. Heck, 151 Ind. 292, 50 N. E. 988; McMillen & Son v. Hall, 59 Ind. App. 545, 554, 109 N. E. 424 (citing text); Pugh v. Chesapeake &c. R. Co., 101 Ky. 77, 39 S. W. 695, 72 Am. St. 392; Cayzer v. Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317; Paulmier v. Erie R. Co., 34 N. J. L. 151; Bryant v. New York &c. R. Co., 81 Hun 164, 30 N. Y. S. 737; Pittsburg &c. R. Co. v. Henderson, 37 Ohio St. 549; Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; International &c. R. Co. v. Sipole (Tex. Civ. App.), 29 S. W. 686; Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; Southern Pac. R. Co. v. Lasch, 2 Tex. Civ. App. 68, 21 S. W. 563; Howe v. St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800; Missouri &c. R. Co. v. Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317, 319 (citing text); Merrill v. Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85; Norfolk &c. R. Co. v. Phelps, 90 Va. 665, 19 S. E. 652; Norfolk &c. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Cowan v. Chicago &c. R. Co., 80 Wis. 284, 50 N. W. 180.

[55] For various conditions and circumstances in which this rule has been applied in railroad cases, see also the following recent cases: Louisville &c. R. Co. v. Young, 153 Ala. 232, 45 So. 238, 16 L. R. A. (N. S.) 301; Nordhaus v. Vandalia R. Co., 242 Ill. 166, 89 N. E. 974; Chicago &c. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936; Henry v. Hudson &c. R. Co., 201 N. Y. 140, 94 N. E. 623; Stone v. Union Pac. R. Co., 35 Utah 305, 100 Pac. 362; Hillis v. Spokane &c. R. Co., 60 Wash. 7, 110 Pac. 624.

[56] New York &c. R. Co. v. Perriguey, 138 Ind. 414, 37 N. E. 976; Harvey v. New York &c. R. Co., 57 Hun 589, 10 N. Y. S. 645; Hartenstine v. United Tel. &c. Co., 219 Pa. St. 95, 67 Atl. 989. See also Gila Valley R. Co. v. Lyon, 9 Ariz. 218, 80 Pac. 337; Missouri &c. R. Co. v. Wise (Tex. Civ. App.), 106 S. W. 465.

by the adjudged cases, but in applying it there is some conflict and much confusion owing to the fact that the courts have in some instances failed to discriminate between proximate and remote causes, but we cannot go into this phase of the subject for it would carry us too far afield.

§ 1874 (1307). The rule as to the master's knowledge of defects.—The rule sustained by the weight of authority is that the master is not liable to the employe unless he had knowledge or was chargeable with knowledge of the defects which were the proximate cause of the employe's injury.[57] It is not necessary that it should be affirmatively shown that the employer had actual knowledge of defects. If the facts are such as make it his duty to have knowledge, then he will be held to possess it.[58]

[57] Erskine v. Chino &c. Co., 71 Fed. 270; Bush v. Cincinnati Trac. Co., 192 Fed. 241; Norfolk &c. R. Co. v. Reed, 167 Fed. 16; Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574; Southern R. Co. v. Carter, 164 Ala. 103, 51 So. 147; Richardson v. Cooper, 88 Ill. 270; Montgomery Coal Co. v. Barringer, 218 Ill. 327, 75 N. E. 900, note in 98 Am. St. 321; Pennsylvania R. Co. v. Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. 251; Evansville &c. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355; Indiana Union Trac. Co. v. Long, 176 Ind. 532, 96 N. E. 604; Carruthers v. Chicago &c. R. Co., 55 Kans. 600, 40 Pac. 915; Cincinnati &c. R. Co. v. Callahan, 148 Ky. 682, 147 S. W. 398; Riley v. State Line &c. Co., 29 La. Ann. 791, 29 Am. Rep. 349; Siegel v. Detroit &c. R. Co., 160 Mich. 270, 125 N. W. 6, 19 Ann. Cas. 1095; Elliott v. St. Louis &c. R. Co., 67 Mo. 272; Laning v. New York &c. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Mixter v. Imperial &c. Co., 152 Pa. St. 395, 25 Atl. 587; Nashville &c. R. Co. v. Hayes, 117 Tenn. 680, 99 S. W. 362, 364 (citing text); Nordstrom v. Spokane &c. R. Co., 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364 n; Griffiths v. London &c. Co., L. R. 13 Q. B. D. 259. In Buzzell v. Laconia &c. Co., 48 Maine 113, 77 Am. Dec. 212, it was said: "The declaration should allege that the insufficiency of the bridge was unknown to the plaintiff and that it was known to the defendant." See post, § 1878; Hart v. Naumburg, 123 N. Y. 641, 25 N. E. 385; Indianapolis &c. Transit Co. v Andis, 33 Ind. App. 625, 72 N. E. 145.

[58] Bean v. Oceanic Co., 24 Fed. 124; Hayden v. Smithville &c. Co., 29 Conn. 548; Schooner "Norway" v. Jensen, 52 Ill. 373; Vaughn v. Chicago Junction R. Co., 249 Ill. 206, 94 N. E. 40; Wabash &c. R. Co. v. Moran, 13 Ill. App. 72; Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628; Chicago &c. R. Co. v. Wilfong, 173 Ind. 308, 90 N. E. 307; Lake Erie &c. R. Co. v. McHenry, 10 Ind. App. 525, 37 N. E.

But in order to charge the employer with knowledge the evidence must show, in cases where actual knowledge is not proved, that he was guilty of negligence in not securing knowledge. Here, as elsewhere in the law of master and servant, the liability of the former exists only where he is guilty of negligence.

§ 1875 (1308). Test of the employer's liability.—The mere fact that after the occurrence of an accident defects are discovered in the machinery or appliances is not sufficient to fasten a liability upon the employer.[59] The duty of the employer is to ex-

186; Romona &c. Co. v. Phillips, 11 Ind. App. 118, 39 N. E. 96; Baltimore &c. R. Co. v. Spaulding, 21 Ind. App. 323, 328, 52 N. E. 410, 411 (citing text); Carruthers v. Chicago &c. R. Co., 55 Kans. 600, 40 Pac. 915; Fluhrer v. Lake Shore &c. R. Co., 121 Mich. 212, 80 N. W. 23; Gutridge v. Missouri &c. Co., 105 Mo. 520, 16 S. W. 943; Honts v. St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Noyes v. Smith, 28 Vt. 59, 63; Clarke v. Holmes, 7 H. & N. 937; Hutchinson v. York &c. R. Co., 5 Exch. 343. See also Missouri &c. R. Co. v. Bailey, 53 Tex. Civ. App. 295, 115 S. W. 601; Missouri &c. R. Co. v. Romans (Tex. Civ. App.), 114 S. W. 157; 4 Thomp. Neg. § 3797, et seq., White's Supp. §§ 3782, 3797, as to what is notice to the master.

[59] Indianapolis &c. R. Co. v. Toy, 91 Ill. 474, 33 Am. Rep. 57; Racine v. New York &c. R. Co., 70 Hun 453, 24 N. Y. S. 388. See also Decker v. Missouri Pac. R. Co., 149 Mo. App. 534, 131 S. W. 118; Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361. The general rule is that no presumption of negligence arises from the occurrence of an accident. Colorado &c. Co. v. Ogden, 3 Colo. 499; Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Baltimore &c. R. Co. v. Bahrs, 28 Md. 647; State v. Phila. &c. R. Co., 47 Md. 76; Baltimore &c. Co. v. State, 54 Md. 648; State v. Philadelphia &c. Co., 60 Md. 555; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Indiana &c. R. Co. v. Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Vissman v. Southern R. Co., 28 Ky. L. 429, 89 S. W. 502, 2 L. R. A. (N. S.) 469; Gilman v. Eastern &c. R. Co., 10 Allen (Mass.) 233, 87 Am. Dec. 635. Negligence may appear however when all the circumstances are considered, and, in jurisdictions which apply the res ipsa loquitur doctrine as between master and servant, negligence may be shown prima facie by the nature and happening of the accident. See notes in 6 L. R. A. (N. S.) 337, 13 L. R. A. (N. S.) 140, 16 L. R. A. (N. S.) 214, 20 L. R. A. (N. S.) 401. See also Oglesby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623. As to the effect of the Ohio statute, see Shankweiler v. Baltimore &c. R. Co., 148 Fed. 195.

ercise ordinary and reasonable care to provide and keep reasonably safe machinery and appliances, but he is not an insurer, so that he cannot be held liable unless it is affirmatively shown that he was guilty of negligence. The test of liability, therefore, is the presence or absence of negligence. If there is no negligence there can be no liability, although there may be defects and the defects may be the proximate cause of the injury.[60] Where reasonable care is exercised in buying machinery and appliances and inspections are made by competent inspectors in a reasonably careful and skilful manner there is no liability, although defects may in fact exist, unless there is, after knowledge, a failure to repair.[61] It is settled law that an employer is not liable unless the defects were known to him or were such as in the exercise of ordinary care he was bound to know, and it necessarily results from this settled rule that there can be no liability where there is reasonable care and skill exercised in providing, inspecting and repairing machinery and appliances.

§ 1876 (1309). Evidence of employer's negligence.—The employe who seeks a recovery for personal injury has the burden of proving a negligent breach of duty on the part of the employer. The evidence must establish negligence and show a breach of the "limited and specific duty of an employer to the employe."[62]

[60] See Mobile &c. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416, 417 (citing text).

[61] Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; East St. Louis Provision Co. v. Hightower, 92 Ill. 139. See Jones v. Malvern &c. Co., 58 Ark. 125, 23 S. W. 679; Hawley v. Northern &c. R. Co., 82 N. Y. 370; Mehan v. Syracuse &c. R. Co., 73 N. Y. 585. See as to buying from reputable dealer, Bush v. Cincinnati Trac Co., 192 Fed. 241; White's Supp., Thomp. Corp. § 3990. Although the employer may have adopted the usual methods of inspecting a boiler, yet, when notified of defect, the employer should take proper steps to locate and correct it. Capital Traction Co. v. McKeon, 132 Md. 79, 103 Atl. 314.

[62] Conrad v. Gray, 109 Ala. 130, 19 So. 398; Georgia &c. R. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. 308; Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; Louisville &c. R. Co. v. Bates, 146 Ind. 561, 45 N. E. 108; Perry v. Michigan Central R. Co., 108 Mich. 130, 65 N. W. 608; Elliott v. St. Louis &c. R. Co., 67 Mo. 272; Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Fenderson v. Atlantic &c. R. Co., 56 N. J. L. 708,

It is not necessary, of course, that the evidence should be direct or positive for negligence may be inferred from circumstances properly proved, but the inference must be a natural and reasonable one, and be more than a mere conjecture.[63] Where the complaint or declaration specifies the defects the plaintiff's evidence must conform to the allegations of the pleading and he cannot recover upon evidence of entirely different defects from those specified in the pleading.[64]

31 Atl. 767; Welch v. New York &c. R. Co., 63 Hun 625, 17 N. Y. S. 342; Pennsylvania &c. Co. v. Mason, 109 Pa. St. 296, 58 Am. Rep. 722; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Pittston &c. Co. v. McNulty, 120 Pa. St. 414, 14 Atl. 387; Erie &c. R. Co. v. Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. 895; Titus v. Bradford &c. R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. 944; Mensch v. Pennsylvania &c. R. Co., 150 Pa. St. 598, 25 Atl. 31, 17 L. R. A. 450; Bruner v. Blaisdell, 170 Pa. St. 25, 32 Atl. 607. See generally Ross v. Pearson &c. Co., 164 Mass. 257, 41 N. E. 284, 49 Am. St. 459; Nitro Glycerine Case, 15 Wall. (U. S.) 524, 537, 21 L. ed. 206; Hermann v. Port Blakely &c. Co., 71 Fed. 853; Jones v. Alabama &c. R. Co., 107 Ala. 400, 18 So. 30; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Wormell v. Maine Cent. R. Co., 79 Maine 397, 1 Am. St. 321; Warner v. New York &c. R. Co., 44 N. Y. 465; Cordell v. New York &c. R. Co., 75 N. Y. 330; Nashville &c. R. Co. v. Hayes, 117 Tenn. 680, 99 S. W. 362. But see under Arkansas statute where a trackman was run down and killed, St. Louis &c. R. Co. v. Standifer, 81 Ark. 275, 99 S. W. 81.

[63] Brymer v. Southern R. Co., 90 Cal. 496, 27 Pac. 371; Case v. Chicago &c. R. Co., 64 Iowa 762, 21 N. W. 30; Walker v. Chicago &c. R. Co., 71 Iowa 658, 33 N. W. 224; Trapnell v. Red Oak Junction, 76 Iowa 744, 39 N. W. 884; Wormell v. Maine &c. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321; Griffin v. Boston &c. R. Co., 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698 and note, 12 Am. St. 526; Dunbar v. McGill, 64 Mich. 676, 31 N. W. 578; Stager v. Ridge Ave. R. Co., 119 Pa. St. 70, 12 Atl. 821; Sorenson v. Menasha, 56 Wis. 338, 14 N. W. 446; Gores v. Graff, 77 Wis. 174, 46 N. W. 48. And the burden is also upon the plaintiff to show that the negligence charged was a proximate cause of the injury complained of. Norfolk &c. R. Co. v. Gesswine, 144 Fed. 56; Savage v. Chicago &c. R. Co., 145 Ill. App. 400; Rase v. Minneapolis &c. R. Co., 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138 n; De Glopper v. Nashville &c. R. Co., 123 Tenn. 633, 134 S. W. 609, 33 L. R. A. (N. S.) 913. Other authorities to this effect have already been cited in various connections, and the subject is treated in the next following section.

[64] Arcade File Works v. Juteau, 15 Ind. App. 460, 44 N. E. 818. See Moyer v. Ramsay &c. Co., 119 Ga. 734, 46 S. E. 844; Cleveland &c. R. Co. v. Wynant, 100 Ind. 160; Chi-

§ 1877 (1310). Employer not liable to employe unless the negligence was the proximate cause of the injury.—It is not sufficient to entitle an employe to recover damages for a personal injury to show a negligent breach of the employer's duty, for to entitle the employe to a recovery it must be shown that the breach of duty was the proximate cause of the injury.[65] The general rule is that negligence will not create a right of action unless it was the proximate cause of the injury,[66] and this general rule applies to actions by an employe against the employer. It is upon the general principle stated that it has been held that a violation of a municipal ordinance requiring a flagman to be stationed at a street crossing will not entitle an employe to re-

cago &c. R. Co. v. Burger, 124 Ind. 275, 24 N. E. 981; Louisville &c. R. Co. v. Renicker, 8 Ind. App. 404, 35 N. E. 1047; Eastman v. Atchison &c. R. Co., 102 Kans. 400, 171 Pac. 1; Gregory v. Chicago &c. R. Co., 42 Mont. 551, 113 Pac. 1123. But compare Tuckett v. American Steam &c. Laundry, 30 Utah 273, 84 Pac. 500, 4 L. R. A. (N. S.) 990, 116 Am. St. 832. And see where negligence is charged generally. Louisville &c. R. Co. v. Lowe, 158 Ala. 391, 48 So. 99; Cleveland &c. R. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932.

[65] Waldhier v. Hannibal &c. R. Co., 87 Mo. 37; Loring v. Kansas City &c. R. Co., 128 Mo. 349, 31 S. W. 6; Hoffnagle v. New York &c. R. Co., 55 N. Y. 608; Bajus v. Syracuse &c. R. Co., 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723 and note; Galveston &c. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129; Whitman v. Wisconsin &c. R. Co., 58 Wis. 408, 17 N. W. 124; Fowler v. Chicago &c. R. Co., 61 Wis. 159, 21 N. W. 40; Pease v. Chicago &c. R. Co., 61 Wis. 163, 20 N. W. 908; Abbott v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. 910. See also Wyman v. Lehigh Val. R. Co., 158 Fed. 957; Nickey v. Stender, 164 Ind. 189, 73 N. E. 117; Baltimore &c. R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308; Jones v. Kansas City &c. R. Co., 178 Mo. 528, 77 S. W. 890; Thompson v. Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Western &c. R. Co. v. Esslinger, 95 Ga. 734, 22 S. E. 580.

[66] Henry v. Southern &c. R. Co., 50 Cal. 176; Billman v. Indianapolis &c. R. Co., 76 Ind. 166, 40 Am. Rep. 230; Pennsylvania Co. v. Horton, 132 Ind. 189, 192, 31 N. E. 45; Leavitt v. Terre Haute &c. R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866; Hoadly v. Northern &c. Co., 115 Mass. 304, 15 Am. Rep. 106; Hoag v. Lake Shore &c. R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Metropolitan &c. R. Co. v. Jackson, L. R. 3 App. Cas. 193.

cover.[67] The rule is illustrated by a case where a switchman was injured by stumbling over a piece of coke and falling in front of a train and it was held that as the stumbling over the piece of coke was the proximate cause of the accident evidence that the drawbars of the car which the switchman was running to couple were defective was immaterial.[68] Another case involving the same general principle is one in which it was held that a brakeman could not recover upon the ground that the engineer failed to give the signals at highway crossings required by the statute.[69] Where an engineer is incompetent and his incompetency is known to the company, still, a brakeman who is injured in negligently attempting to couple the cars of a train running at an obviously dangerous rate of speed cannot recover damages from the company.[70]

[67] Kansas City &c. R. Co. v. Kirksey, 60 Fed. 999. Nor will the violation of a municipal ordinance entitle a third person to recover unless it was the proximate cause of his injury. Pennsylvania Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188; State v. Manchester &c. R. Co., 52 N. H. 528.

[68] Cincinnati &c. R. Co. v. Mealer, 50 Fed. 725, citing Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256. See also Hunt v. Kane, 100 Fed. 256; St. Louis &c. R. Co. v. Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710. But compare Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652; Watt v. Mishawaka &c. Co., 53 Ind. App. 682, 99 N. E. 1029; Balzer v. Waring, 176 Ind. 585, 95 N. E. 257, 48 L. R. A. (N. S.) 834 n.

[69] Randall v. Baltimore & O. R. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003, affirming the doctrine of O'Donnell v. Providence &c. R. Co., 6 R. I. 211; Harty v. Central &c. R. Co., 42 N. Y. 468, that statutes requiring signals at crossings are not intended for the protection of employes.

[70] Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154. The decision in the case cited was put upon the ground of contributory negligence, but it seems clear that the incompetency of the engineer was not the proximate cause of the injury. There is often difficulty in discriminating between cases where recovery is defeated upon the ground of contributory negligence and where it is defeated upon the ground that the negligence of the defendant was not the proximate injury. In Chicago &c. R. Co. v. Kennedy, 2 Kans. App. 693, 43 Pac. 802, the question of proximate cause is considered and it was held that although the violation of a municipal ordinance is negligence, yet there could be no recovery unless the violation of the ordinance was the proximate cause of the injury. The court cited among other cases, Atchison &c. R. Co.

§ 1878 (1311). **Knowledge of defects on part of employe—Averment and proof.**—It is a well-settled general rule, as we have seen, that the employe cannot recover for injuries caused by defects of which he has knowledge and the risks of which he appreciates.[71] The employe is generally required to aver in his complaint or declaration that he did not have knowledge of the defects and that the employer did have knowledge.[72] There is, we know, some conflict of authority upon this question but we think the rule stated is the correct one for of defects of which the employe has notice he takes the risk, and in order to constitute a cause of action it is necessary to show that the defect is one for which the employer is responsible and for defects known

v. Morgan, 31 Kans. 77, 1 Pac. 298; Quincy R. Co. v. Wellhoener, 72 Ill. 60; Stoneman v. Atlantic &c. R. Co., 58 Mo. 503.

[71] Missouri &c. R. Co. v. Spellman (Tex.), 34 S. W. 298; Gann v. Railroad, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. 687; Odell v. New York &c. R. Co., 120 N. Y. 323, 24 N. E. 478, 17 Am. St. 650; Union Pac. R. Co. v. Marone, 246 Fed. 916; Boldt v. Pennsylvania R. Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. ed. 385. But see Swadley v. Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. 366. It has been held that he must have sufficient time and opportunity to make objection. In Wright v. Chicago &c. R. Co., 160 Ind. 583, 66 N. E. 454; Louisville &c. R. Co. v. Kelly, 63 Fed. 407, 409.

[72] Louisville &c. R. Co. v. Corps, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636 and note; Matchett v. Cincinnati &c. R. Co., 132 Ind. 334, 31 N. E. 792; Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Cleveland &c. R. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932; New Kentucky &c. R. Co. v. Abbani, 12 Ind. App. 497, 40 N. E. 702; Louisville &c. R. Co. v. Quinn, 14 Ind. App. 554, 43 N. E. 240; Buzzell v. Laconia &c. Co., 48 Maine 113, 77 Am. Dec. 212; Griffiths v. London &c. Co., L. R. 13 Q. B. D. 259. See also Montgomery Coal Co. v. Barriger, 218 Ill. 327, 75 N. E. 900; Chicago &c. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826. It has been held that an allegation that he had no knowledge of the defect or danger repels implied as well as actual knowledge, but that the evidence must show not only that he had no actual knowledge but also that he could not have known thereof by the exercise of ordinary care. Consolidated Stone Co. v. Summit, 152 Ind. 297, 300, 53 N. E. 235. See also Evansville &c. R. Co. v. Duel, 134 Ind. 156, 33 N. E. 355; Chicago &c. R. Co. v. Barker, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542 n, 14 Ann. Cas. 375; Peerless Stone Co. v. Wray, 143 Ind. 574, 42 N. E. 927; Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 535, 53 N. E. 763. Equal knowledge on the part

to the employe he is not responsible.[73] The fact that the employe has notice of defects does not defeat him simply upon the ground of contributory negligence, but defeats him because he assumes the risks of injury from such defects. The question is not properly one of contributory negligence but of risks assumed.[74]

§ 1879 (1312). Knowledge of defects on part of employe—Evidence of.—It is not necessary to prove by direct or positive evidence that an employe has knowledge of the dangers of the place in which he is required to work, or of defects in appliances or machinery. If facts are shown legitimately authorizing the inference of knowledge it will be sufficient. If defects are shown to be open and obvious to observation it is generally sufficient to charge the employe with knowledge, and knowledge may be inferred from evidence of familiarity with the working place or the machinery with which he is required to work.[75] Where the defect is in an appliance not open to

of the employer and employe imposes upon the employed the risks, Indianapolis &c. R. Co. v. Love, 10 Ind. 554; Missouri &c. R. Co. v. Spellman (Tex.), 34 S. W. 298.

[73] Chicago &c. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74, 76 (quoting text). But see cases and notes in 16 L. R. A. (N. S.) 963 and Ann. Cas. 1913B, 1194, where cases are cited on both sides. As already shown, the term assumption of risks is often used in two different senses and this is one reason why there is apparent conflict among the authorities, some of which is more apparent than real.

[74] Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 267, 19 N. E. 770; Evansville &c. R. Co. v. Duel, 134 Ind. 156, 159, 33 N. E. 355; 4 Thomp. Neg. (2d ed.) 464, et seq. See generally Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Henderson v. Kentucky &c. R. Co., 86 Ky. 389, 5 S. W. 875; Chicago &c. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74, 77 (citing text).

[75] Chesapeake &c. R. Co. v. Hennessey, 96 Fed. 713; Lindsay v. New York &c. R. Co., 112 Fed. 384; Lake Erie &c. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573; Morris v. Gleason, 1 Ill. App. 510; Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200; Gorman v. Minneapolis &c. R. Co., 78 Iowa 509, 43 N. W. 303; Quinn v. Chicago &c. R. Co., 107 Iowa 710, 77 N. W. 464; Lovejoy v. Boston &c. R. Co., 125 Mass. 79, 28 Am. Rep. 206; Leary v. Boston &c. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; Fuller v. New York &c. R. Co., 175 Mass. 425, 56 N. E. 574; Walsh v. St. Paul &c. R. Co., 27 Minn. 367,

observation it cannot be inferred from the mere fact that the employe used the appliances that he was aware of the defect, nor can it be inferred that there was knowledge of such a defect unless the time during which the employe used it was reasonably sufficient to enable the employe to discover it.[76]

§ 1880 (1313). Contributory negligence of employes.—It is quite well agreed that contributory negligence on the part of an employe will defeat an action for the recovery of damages for injuries caused by the negligence of the employer.[77] There is much diversity of opinion upon the question as to which party has the burden. Some of the courts hold that the bur-

8 N. W. 145, 2 Am. & Eng. R. Cas. 144; Clark v. St. Paul &c. R. Co., 28 Minn. 128, 9 N. W. 581; Berger v. St. Paul &c. R. Co., 39 Minn. 78, 38 N. W. 814; Rains v. St. Louis &c. R. Co., 71 Mo. 164, 36 Am. Rep. 459, 5 Am. & Eng. R. Cas. 610; Baylor v. Delaware &c. R. Co., 40 N. J. L. 23, 29 Am. Rep. 208; Gibson v. Erie &c. R. Co., 63 N. Y. 449, 20 Am. Rep. 552; New York &c. R. Co. v. Powers, 98 N. Y. 274, 21 Am. & Eng. R. Cas. 609; Kelly v. Baltimore &c. R. Co. (Pa. St.), 11 Atl. 659; Gaffney v. New York &c. R. Co., 15 R. I. 456, 7 Atl. 284, 31 Am. & Eng. R. Cas. 265; Grandin v. Southern Pac. Co., 30 Utah 360, 85 Pac. 357; Norfolk &c. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370; Goltz v. Milwaukee &c. R. Co., 76 Wis. 136, 44 N. W. 752. But see Sioux City &c. R. Co. v. Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724 and note, 18 Am. & Eng. R. Cas. 68; Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. 47; Colorado &c. R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Central R. Co. v. Haslett, 74 Ga. 59; Illinois &c. R. Co. v. Sanders, 166 Ill. 270, 46 N. E. 799; 4 Thomp. Neg. §§ 4645, 4646.

[76] Northern Pac. &c. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. ed. 755; Smith v. Peninsular Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. 542 and note. See also Illinois &c. R. Co. v. Sanders, 166 Ill. 240, 46 N. E. 799; Wright v. Chicago &c. R. Co., 160 Ind. 583, 66 N. E. 454; Hargrove v. Gulf &c. R. Co. (Tex. Civ. App.), 202 S. W. 188.

[77] Bunt v. Sierra &c. Co., 138 U. S. 483, 11 Sup. Ct. 464, 34 L. ed. 1031; Allen v. New York &c. R. Co., 174 Fed. 779; Jersey City, The, 46 Fed. 134; Mayfield v. Savannah &c. R. Co., 87 Ga. 374, 13 S. E. 459; Magee v. Chicago &c. R. Co., 83 Iowa 249, 48 N. W. 92; Bomar v. Louisiana &c. R. Co., 42 La. Ann. 983, 8 So. 478; Roddy v. Missouri &c. R. Co., 10 Mo. 234, 15 S. W. 1112, 43 Alb. L. J. 479; East Tennessee &c. R. Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Quibell v. Union &c. R. Co., 7 Utah 122, 25 Pac. 734; Helfrich v. Ogden &c.

den is on the plaintiff to prove that he was not guilty of contributory negligence;[78] but the majority of the courts hold that it is on the defendant.[79] Railroad employes may be guilty of contributory negligence in cases where they disobey rules or orders, where they voluntarily leave their post and go to

R. Co., 7 Utah 186, 26 Pac. 295; Moore v. Norfolk &c. R. Co., 87 Va. 489, 12 S. E. 968; 5 Thomp. Neg. (2d ed.), § 5325; White's Supp., Thomp. Neg. §. 5325, et seq.

[78] Park v. O'Brien, 23 Conn. 339; Prather v. Richmond &c. R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; Ludd v. Wilkins, 118 Ga. 525, 45 S. E. 429; Galena &c. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Terre Haute &c. R. Co. v. Graham, 95 Ind. 291; Greenleaf v. Illinois &c. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Lesan v. Maine &c. R. Co., 77 Maine 85; Murphy v. Deane, 101 Mass. 455; Mitchell v. Chicago &c. R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Mynning v. Detroit &c. R. Co., 67 Mich. 677, 35 N. W. 811; Mississippi Central &c. R. Co. v. Mason, 51 Miss. 234; Owens v. Richmond &c. R. Co., 88 N. Car. 502; Waite v. Northeastern &c. R. Co., El. Bl. & E. 719. See also McHugh v. Manhattan R. Co., 88 App. Div. 554, 85 N. Y. S. 184; O'Connor v. Connecticut R. Co., 82 Conn. 170, 72 Atl. 934; Auellette v. Grand Trunk R. Co., 106 Maine 153, 76 Atl. 280, 138 Am. St. 340; Lizotte v. New York Cent. &c. R. Co., 196 Mass. 519, 83 N. E. 362; 1 Thomp. Neg. § 365, and cases there cited.

[79] Hough v. Railway Co., 100 U. S. 213, 25 L. ed. 612; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Grand Trunk &c. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Texas & P. R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. ed. 78; Chunn v. City & S. R. Co., 207 U. S. 302, 28 Sup. Ct. 63, 52 L. ed. 219; Amato v. Northern &c. R. Co., 46 Fed. 561; Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Finn v. Vallejo &c. Co., 7 Cal. 253; Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; Thompson v. Central &c. Co., 54 Ga. 509; St. Louis &c. R. Co. v. Weaver, 35 Kans. 412, 11 Pac. 408, 57 Am. Rep. 176 and note; Paducah &c. R. Co. v. Hoehl, 12 Bush (Ky.) 41; Northern &c. R. Co. v. State, 31 Md. 357; Hocum v. Weitherick, 22 Minn. 152; Hicks v. Pacific R. Co., 65 Mo. 34; Nord v. Boston &c. Co., 30 Mont. 48, 75 Pac. 681; Moore v. Central &c. R. Co., 24 N. J. L. 268; White v. Concord &c. R. Co., 30 N. H. 188; Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690; Freer v. Cameron, 4 Rich. L. (S. Car.) 228; Danner v. South Carolina R. Co., 4 Rich. L. (S. Car.) 329, 55 Am. Dec. 678; San Antonio &c. R. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Holden v. Liverpool &c. Co., 3 C. B. 1; Davey v. London &c. R. Co., 11 L. R. Q. B. Div. 213; Bridge v. Grand Junction R. Co., 3 M. & W. 244; Martin v. Great

one of greater danger, or where they fail to exercise ordinary care to guard against dangers known to them, or which, in the exercise of ordinary prudence and caution, they ought to have known.[80] Some of the cases hold that where an employe uses an appliance for a purpose for which it is not intended, or goes to a place different from that which the contract of service requires him to occupy, he is guilty of contributory negligence, and, for that reason, can not hold the employer liable, but we are of the opinion, as elsewhere indicated, that in such cases the true ground upon which the rule that the

Northern &c. R. Co., 16 C. B. 179; 1 Thomp. Neg. § 366 and authorities there cited; White's Supp. to Thomp. Neg. §§ 364, 366, 7696, and numerous cases there cited. It is now on the defendant, by statute, in Indiana. Southern Indiana R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722; Indianapolis St. R. Co. v. Robinson, 157 Ind. 233, 61 N. E. 197. But the statute provides that it may be shown under the general denial, and it is available to the defendant if shown by the plaintiff's own evidence. Pittsburg &c. R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218; Pittsburg &c. R. Co. v. Collins, 163 Ind. 569, 71 N. E. 661; Indianapolis St. R. Co. v. Taylor, 158 Ind. 274, 63 N. E. 456; Evansville &c. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 609.

[80] The text is cited with approval in Robertson v. Ford, 164 Ind. 538, 74 N. E. 1, 4. Where there is a safe mode of performing a duty and the employe, instead of performing the duty in that mode adopts an unsafe one, the general rule is that he is guilty of contributory negligence. Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Erskine v. Chino &c. Co., 71 Fed. 270; Morris v. Duluth &c. R. Co., 108 Fed. 747; Gilbert v. Burlington &c. R. Co., 128 Fed. 529; Central of Ga. R. Co. v. Mosley, 112 Ga. 914, 38 S. E. 350; Harper v. Illinois Cent. R. Co., 131 Ky. 225, 115 S. W. 198; Williams v. Arkansas &c. R. Co., 125 La. 894, 51 So. 1027; Hurst v. Kansas City &c. R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. 539; note in 97 Am. St. 895; Beck v. Southern R. Co., 149 N. Car. 168, 62 S. E. 883; Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S. E. 821; Ryan v. Northern Pac. R. Co., 53 Wash. 279, 101 Pac. 880. But see Brinkmeier v. Missouri Pac. R. Co., 69 Kans. 738, 77 Pac. 586; Florida Cent. &c. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148, 33 So. 1010; Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. 887. See generally Pratt v. Southern R. Co., 165 Ala. 501, 51 So. 604; El Dorado &c. R. Co. v. Whatley, 88 Ark. 20, 114 S. W. 234, 129 Am. St. 93; Spencer v. Ohio &c. R. Co., 130 Ind. 181, 29 N. E. 915; Bresnahan v. Michigan &c. R. Co., 49 Mich. 410, 13 N. W. 797; Young v. St. Louis &c. R. Co., 227 Mo. 307, 127 S. W. 19. The duty of em-

employer is not liable rests is that the duty of the employer does not extend over such cases. We think that there may be no negligence on the part of the employe and still a recovery cannot be had because he goes to a place, or does an act, not embraced by the contract of service, and, while there, is not within the duty created by the contract of service. If the evidence, whether adduced by the plaintiff or the defendant, shows contributory negligence, it will defeat a recovery,[81] and if it is clearly shown without substantial conflict, although there may be a scintilla of the evidence to the contrary, the court may direct a verdict.[82] It is not always sufficient to defeat a recovery that there be evidence of negligence on the part of the employe, for it must also appear that such negligence proximately contributed to the injury.[83]

§ 1881 (1314). Contributory negligence of employes—Illustrative instances.—The cases applying the doctrine of contributory negligence to railroad employes are very numerous, and we shall not undertake to cite a very great number of them, but shall refer to some of them which seem to most clearly

ployes is not to assume unnecessary risks, and this duty requires them to take the safe course when work can be done in one of two methods, the one safe and the other unsafe. St. Louis &c. Co. v. Brennan, 20 Ill. App. 555; St. Louis &c. Co. v. Burke, 12 Ill. App. 369.

[81] Horn v. Baltimore &c. R. Co., 54 Fed. 301; Pittsburg &c. R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218; Pittsburg &c. R. Co. v. Collins, 163 Ind. 569, 71 N. E. 661; Grand Trunk &c. R. Co. v. Reynolds (Ind. App.), 90 N. E. 94; McMurtry v. Louisville &c. Co., 67 Miss. 601, 7 So. 401; Smith v. Chicago &c. R. Co., 4 S. Dak. 30, 71, 55 N. W. 717; Washington &c. R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035; 1 Thomp. Neg. § 369.

[82] Johnson v. Hudson R. Co., 20 N. Y. 65; post, § 2713. See also Brown v. Northern Pac. R. Co., 43 Wash. 1, 86 Pac. 1053, 75 Am. Dec. 375 and note; Texas &c. R. Co. v. Lacey, 185 Fed. 225, Chicago &c. R. Co. v. Baldwin, 164 Fed. 826.

[83] Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; Erie R. Co. v. Schomer, 171 Fed. 798; McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367; Delinks v. New York &c. R. Co., 85 Conn. 102, 81 Atl. 1036; New York &c. R. Co. v. Hamlin (Ind.), 79 N. E. 1040; Yeager v. Chicago &c. R. Co., 156 Iowa 166, 135 N. W. 638; White v. Louisville &c. R. Co., 72 Miss. 12, 16 So. 248; Kiley v. Rutland R. Co., 80 Vt. 536, 68 Atl. 713; Phillips v. Chicago &c. R. Co., 64 Wis. 475, 25 N. W. 544;

illustrate the application of the general doctrine. It is very generally held that disobedience of the rules and orders of the employer when a proximate cause of the injury constitutes contributory negligence.[84] There may be exceptional circumstances which will excuse disregard of orders or rules,[85] but, prima facie, disobedience is always negligence, and it is

Tuff v. Warman, 5 C. B. (N. S.) 573, 586. See also Chicago &c. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15; Houston &c. R. Co. v. Turner, 34 Tex. Civ. App. 397, 78 S. W. 712.

[84] Louisville &c. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. 127; Louisville &c. R. Co. v. Woods, 105 Ala. 561, 17 So. 41; Chicago &c. R. Co. v. Flynn, 154 Ill. 448, 40 N. E. 332; Chicago &c. R. Co. v. Maney, 55 Ill. App. 588; Cleveland &c. R. Co. v. Oesterling, 182 Ind. 481, 103 N. E. 401; LeBahn v. New York &c. R. Co., 80 Hun 116, 30 N. Y. S. 7; Bryant v. New York &c. R. Co., 84 Hun 164, 30 N. Y. S. 737; Smith v. New York &c. R. Co., 88 Hun 468, 34 N. Y. S. 881; Fritz v. Missouri &c. R. Co. (Tex. Civ. App.), 30 S. W. 85; Davis v. Nutalisburg &c. Co., 34 W. Va. 500, 12 S. E. 539; Robinson v. West Virginia &c. R. Co., 40 W. Va. 583, 21 S. E. 727. See also Keenan v. Railroad Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. 604; Green v. Brainerd &c. R. Co., 85 Minn. 318, 88 N. W. 974, 976 (citing text); Nordquist v. Great Northern R. Co., 89 Minn. 485, 95 N. W. 322; Scott v. Eastern R. Co., 90 Minn. 135, 95 N. W. 892; Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408, 13 L. R. A. 465, and cases cited, note in 98 Am. St. 319; Texas &c. R. Co. v. Fields, 32 Tex. Civ. App. 414, 74 S. W. 930; note to Southern R. Co. v. Johnson, Ann. Cas. 1912A, 84, and note to Harris v. London St. R. Co., 10 Ann. Cas. 152, ante, § 1843, and post §§ (2541, 2543). As to the kind of rule to which this doctrine applies, see St. Louis &c. R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749; Cleveland &c. R. Co. v. Oesterling, 182 Ind. 481, 103 N. E. 401. Where a violation of the time table regulations or of other rules brings on a collision, the employes who disobey the rules can not recover. Sutherland v. Troy &c. R. Co., 125 N. Y. 737, 26 N. E. 609. Coupling cars in disobedience of rules. Schaub v. Hannibal &c. R. Co., 106 Mo. 74, 16 S. W. 924; East Tennessee &c. R. Co. v. Smith, 89 Tenn. 114, 14 S. W. 1077; Sloan v. Georgia &c. R. Co., 86 Ga. 15, 12 S. E. 179, 44 Am. & Eng. R. Cas. 553; Pryor v. Louisville &c. R. Co., 90 Ala. 32, 8 So. 55; Grand v. Michigan &c. R. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380.

[85] Memphis &c. R. Co. v. Graham, 94 Ala. 545, 10 So. 283; Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Cleveland &c. R. Co. v. Quinn, 54 Ind. App. 11, 101 N. E. 406; Hannah v. Connecticut &c. R. Co., 154 Mass. 529, 28 N. E. 682; Illinois Cent. R. Co. v. Person, 63 Miss. 319, 3 So. 375. See Illinois

only in clear cases that disobedience should be held to be excused. The assent of other co-employes will not release from the consequences of a disobedience of established rules.[86] Some of the cases hold that where an employe voluntarily encounters a danger against which he is warned, he is guilty of contributory negligence,[87] but we think that he assumes the risk from such danger as one of the risks of his service, and for that reason cannot recover.[88] An employe, where there is no emergency, who knowingly or carelessly assumes an unnecessary risk, is often said to be guilty of contributory negligence.[89]

&c. R. Co. v. Gilbert, 157 Ill. 354, 41 N. E. 724; Light v. Chicago &c. R. Co., 93 Iowa 83, 61 N. W. 380. See also Carson v. Southern R. Co., 194 U. S. 136, 24 Sup. Ct. 609, 48 L. ed. 907; Union Pac. R. Co. v. Springsteen, 41 Kans. 724, 21 Pac. 774; Louisville &c. R. Co. v. Payne's Admr., 177 Ky. 462, 197 S. W. 928, L. R. A. 1918C, 376 and note; Hurlbut v. Railroad Co., 130 Mo. 657, 31 S. W. 1051.

[86] Atchison &c. R. Co. v. Reesman, 60 Fed. 370, 23 L. R. A. 768; Port Royal &c. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833; Westcott v. New York &c. R. Co., 153 Mass. 460, 27 N. E. 10; Richmond &c. R. Co. v. Rush, 71 Miss. 987, 15 So. 133; Lehigh &c. R. Co. v. Snyder, 56 N. J. L. 326, 28 Atl. 376; ante § 1843. But see Illinois &c. R. Co. v. Neer, 31 Ill. App. 126. Effect of inconsistent orders. Hall v. Chicago &c. R. Co., 46 Minn. 439, 49 N. W. 239. Effect of an order of a superior where no emergency. Davis v. Western &c. R. Co., 107 Ala. 626, 18 So. 173. As to when custom to contrary will not excuse, see St. Louis &c. Ry. Co. v. Anderson (Tex. Civ. App.), 171 S. W. 806.

[87] Williams v. Walton &c. Co., 9 Houst. (Del.) 322, 32 Atl. 726; Sauer v. Lake Shore &c. R. Co., 108 Mich. 31, 65 N. W. 624.

[88] Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Paland v. Chicago &c. R. Co., 44 La. Ann. 1003, 11 So. 707; Haley v. Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321; Lasky v. Canadian &c. R. Co., 83 Maine 461, 22 Atl. 367. See Niles v. Minneapolis &c. R. Co., 107 Mich. 238, 65 N. W. 103.

[89] Hudson v. Charleston &c. R. Co., 55 Fed. 248; Burgin v. Louisville &c. R. Co., 97 Ala. 274, 12 So. 395; Alabama &c. R. Co. v. Richie, 99 Ala. 346, 12 So. 612; Browne v. New York &c. R. Co., 158 Mass. 247, 33 N. E. 650; Novock v. Michigan &c. R. Co., 63 Mich. 121, 29 N. W. 525; Lyttle v. Chicago &c. R. Co., 84 Mich. 289, 47 N. W. 571; Wilson v. Michigan &c. R. Co., 94 Mich. 20, 53 N. W. 797; Dowell v. Vicksburg &c. R. Co., 61 Miss. 519; Finnell v. Delaware &c. R. Co., 129 N. Y. 669, 29 N. E. 825; Chambers v. Western R. Co., 91 N. Car. 471. See also Alabama &c. R. Co. v. Roach, 110 Ala. 266, 20 So. 132; Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 S. E. 986;

But a sudden emergency, and an act in attempting to save life or the employer's property, may be such that the employe may be held free from contributory negligence under the circumstances, although such act might, under other circumstances, defeat him on the ground of contributory negligence.[90] It is the duty of all employes to exercise ordinary care to avoid injury,[91] to take reasonable precautions against known dan-

Thielker v. East St. Louis R. Co., 140 Ill. App. 138; Sheets v. Chicago &c. R. Co., 139 Ind. 682, 35 N. E. 154; Martensen v. Chicago &c. R. Co., 60 Iowa 705, 15 N. W. 569; Cowles v. Chicago &c. R. Co., 102 Iowa 507, 71 N. W. 580; State v. Western &c. R. Co., 105 Md. 30, 65 Atl. 635; Jean v. Boston &c. R. Co., 181 Mass. 197, 63 N. E. 399; Missouri &c. R. Co. v. Sharp (Tex. Civ. App.), 120 S. W. 263; Johnson v. Chesapeake &c. R. Co., 38 W. Va. 206, 18 S. E. 573.

[90] See Whitworth v. Shreveport Belt R. Co., 112 La. Ann. 363, 36 So. 414, 65 L. R. A. 129; Erie R. Co. v. Schomer, 171 Fed. 798; Colorado Midland R. Co. v. Brady, 45 Colo. 203, 101 Pac. 62; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104; Cleveland &c. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158; Murphy v. Chicago &c. R. Co., 140 Iowa 332, 118 N. W. 390 (provided emergency is caused by negligence of defendant); Dailey v. Burlington &c. R. Co., 58 Nebr. 396, 78 N. W. 722; Corbin v. Philadelphia, 195 Pa. St. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. 825; Trinity &c. R. Co. v. Elgin, 56 Tex. Civ. App. 573, 121 S. W. 577; Fisher v. Chesapeake &c. R. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954; Smith v. Spokane Falls &c. R. Co., 52 Wash. 350, 100 Pac. 747. But compare Rawlston v. East Tenn. &c. R. Co., 94 Ga. 536, 20 S. E. 183; Condiff v. Kansas City &c. R. Co., 45 Kans. 256, 25 Pac. 562; Morris v. Lake Shore &c. R. Co., 148 N. Y. 186, 42 N. E. 579; Chattanooga &c. Co. v. Hodges, 109 Tenn. 331, 70 N. W. 616, 60 L. R. A. 459, 97 Am. St. 844. Several of these, and other authorities on both sides, are reviewed in the note in 2 L. R. A. 954. And see also as to compliance with sudden command in emergency. Illinois Cent. R. Co. v. Atwell, 198 Ill. 200, 64 N. E. 1095; Allison v. Southern R. Co., 129 N. Car. 336, 40 S. E. 91; Greenleaf v. Iowa Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

[91] Southern Pac. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. ed. 485; Chicago &c. R. Co. v. Davis, 53 Fed. 61, 53 Am. & Eng. R. Cas. 461; Louisville &c. R. Co. v. Crawford, 89 Ala. 240, 8 So. 243, 44 Am. & Eng. R. Cas. 568; St. Louis &c. R. Co. v. Mara (Ark.), 16 S. W. 196; Pieart v. Chicago &c. R. Co., 82 Iowa 148, 47 N. W. 1017; Erickson v. Monson &c. Co., 100 Maine 107, 60 Atl. 708; Hickey v. Boston &c. R. Co., 14 Allen (Mass.) 429; Tomko v. Central &c. R. Co., 1 App. Div. 289, 37 N. Y. S. 144; Le-

gers,[92] and not to expose themselves to extraordinary dangers.[93] It is held by some of the courts that where the employer assures the employe that there is no danger, and the employe acts upon such assurance, he is not guilty of contributory negligence,[94] but we suppose that this rule would not prevail if the employe had full knowledge of the danger, especially if it were such that an ordinarily prudent man would not encounter it.[95] An employe may, within limits, act upon the assumption

high &c. R. Co. v. Greiner, 113 Pa. St. 600, 6 Atl. 246; Dooner v. Delaware &c. R. Co., 171 Pa. St. 581, 33 Atl. 415. They must use their senses and not remain blind as to their surroundings and danger. Day v. Cleveland &c. R. Co., 137 Ind. 206, 36 N. E. 854; Prothero v. Citizens' St. R. Co., 134 Ind. 431, 33 N. E. 765; Williams v. Choctaw &c. R. Co., 149 Fed. 104, 106 and cases there cited.

[92] St. Louis &c. R. Co. v. Bloyd, 60 Ark. 637, 31 S. W. 457; Illinois &c. R. Co. v. Winslow, 56 Ill. App. 462; Baker v. Chicago &c. R. Co., 95 Iowa 163, 63 N. W. 667; Nelling v. Chicago &c. R. Co., 98 Iowa 554, 63 N. W. 568; Haden v. Sioux City &c. R. Co., 99 Iowa 735, 48 N. W. 733; Loring v. Kansas City &c. R. Co., 128 Mo. 349, 31 S. W. 6; Houston &c. R. Co. v. Crawford (Tex. Civ. App.), 32 S. W. 155; Beuhring v. Chesapeake &c. R. Co., 37 W. Va. 502, 16 S. W. 435; Stewart v. Ohio &c. R. Co., 40 W. Va. 188, 20 S. E. 922.

[93] Andrews v. Birmingham &c. R. Co., 99 Ala. 436, 12 So. 432; Rawlston v. East Tennessee &c. R. Co., 94 Ga. 536, 20 S. E. 123; Georgia &c. R. Co. v. Hallman, 97 Ga. 317, 23 S. E. 73; Walker v. Redington &c. Co., 86 Maine 191, 29 Atl. 979; York v. Kansas City &c. R. Co., 117 Mo. 405, 22 S. W. 1081; Cooney v. Great Northern &c. R. Co., 9 Wash. 292, 37 Pac. 438. See Northern Pac. R. Co. v. Egeland, 56 Fed. 200. Where an employe voluntarily makes use of an engine, unsafe unless proper precautions are used, he is guilty of contributory negligence unless he uses such precautions. Thompson v. Montana &c. R. Co., 17 Mont. 426, 43 Pac. 496. See Erskine v. Chino &c. Co., 71 Fed. 270; Union Pac. R. Co. v. Marone, 246 Fed. 916.

[94] Warner v. Chicago &c. R. Co., 1 Mo. App. 490. See also Chicago, Anderson &c. Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; McKee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071; St. Louis &c. R. Co. v. Mathis, 76 Ark. 184, 91 S. W. 763, 48 L. R. A. 542 and note; St. Louis &c. R. Co. v. Mangan, 86 Ark. 507, 112 S. W. 168; Illinois Cent. R. Co. v. Cane, 28 Ky. L. 1018, 90 S. W. 1061. But compare Rohrbacher v. Woodward, 124 Mich. 135, 82 N. W. 797.

[95] See Pittsburg &c. R. Co. v. Schaub, 136 Ky. 652, 124 S. W. 885, 136 Am. St. 273; Lindsay v. Hollerback, 29 Ky. L. 68, 92 S. W. 294, 4 L. R. A. (N. S.) 830; Burke v.

that the employer's duty to exercise ordinary care has been performed,[96] but the fact that the employe may act upon such assumption does not relieve him from the duty of exercising ordinary care to avoid injury.[97] The presumption that the duties of the employer to the employe have been performed does not authorize the employer to carelessly or heedlessly venture into danger, nor does it relieve him from the duty of taking knowledge of and guarding against dangers plainly and fully open to observation.[98] The duties of employer and employe as to discovering defects and dangers are not the same, for the duty of the employer is greater than that of the employe, and what would be negligence on the part of the employer is not always or necessarily negligence on the part of the employe. In the majority of cases the question of contributory negligence is one of fact for the jury, but, as is evident from the great number of cases with which the books abound, it is very frequently a question of law for the court. There is much conflict of opinion as to when the question is one of law for the court and when it is one of fact for the

Davis, 191 Mass. 20, 76 N. E. 1039, 4 L. R. A. (N. S.) 971, 114 Am. St. 591; Chicago &c. R. Co. v. Crotty, 141 Fed. 913, 4 L. R. A. (N. S.) 832; Kansas City &c. R. Co. v. Billingslea, 116 Fed. 335, note to Nelson &c. Co. v. Pitts, 23 L. R. A. (N. S.) 1013, 1016.

[96] Bradbury v. Goodwin, 108 Ind. 286, 9 N. E. 302; Michigan &c. R. Co. v. Dolan, 32 Mich. 510; Russell v. Minneapolis &c. R., 32 Minn. 230, 20 N. W. 147; Cook v. St. Paul &c. R. Co., 34 Minn. 45, 24 N. W. 311; Gibson v. Pacific Ry. Co., 46 Mo. 163, 2 Am. Rep. 497; Wallace v. Central &c. R. Co., 138 N. Y. 302, 59 Am. & Eng. R. Cas. 264. See also Carter v. McDermott, 29 App. D. C. 145, 10 L. R. A. (N. S.) 1103; Central &c. R. Co. v. Brantley, 93 Ga. 259, 20 S. E. 98; Abbitt v. Lake Erie &c. R. Co., 150 Ind. 498; Chicago &c. R. Co. v. Steele, 187 Ind. 358, 118 N. E. 824, 119 N. E. 483; Wilder v. Great Western R. Co., 130 Iowa 263, 104 N. W. 434; Gulf &c. R. Co. v. Boyce 39 Tex. Civ. App. 193, 87 S. W. 395; Hynson v. St. Louis &c. R. Co., 39 Tex. Civ. App. 48, 86 S. W. 928; note in 98 Am. St. 310.

[97] Long v. Coronado &c. R. Co., 96 Cal. 269, 31 Pac. 170. See Devine v. Savannah &c. R. Co., 89 Ga. 541, 15 S. E. 781.

[98] Rogers v. Leyden, 127 Ind. 50, 58, 26 N. E. 210; Wormell v. Maine &c. R. Co., 79 Maine 397, 10 Atl. 49, 1 Am. St. 321; Skipp v. Eastern Counties &c. R. Co., 9 Exch. 223. See also Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

jury. We shall not enter this field of conflict, for an adequate consideration of the subject would require far more space than we can yield it.[99]

§ 1882 (1315). Contributory negligence—Violation of statutory duty.—There are many modern statutes requiring the performance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is suggested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of a statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute explicitly abrogates the rule of the common law.[1] Prin-

[99] State Trust Co. v. Kansas City &c. R. Co., 111 Fed. 769; Warden v. Louisville &c. R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552 and note; Richmond &c. R. Co. v. Thomason, 99 Ala. 471, 12 So. 273; Devine v. Savannah &c. R. Co., 89 Ga. 541, 15 S. E. 781; Guthrie v. Great Northern R. Co., 76 Minn. 277, 79 N. W. 107; Merritt v. Great Northern R. Co., 81 Minn. 496, 84 N. W. 321. For recent cases holding railroad employes guilty of contributory negligence, see Wagnon v. Houston &c. R. Co., 40 Tex. Civ. App. 467, 89 S. W. 1112; Brown v. Northern Pac. R. Co., 44 Wash. 1, 86 Pac. 1053; Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922; Goff v. Chippewa &c. R. Co., 86 Wis. 237, 56 N. W. 465. For recent cases holding them not guilty of contributory negligence as matter of law, and that it was for the jury, see Dunphy v. St. Joseph &c. Co., 118 Mo. App. 506, 95 S. W. 301; St. Louis &c. R. Co. v. Miles, 79 Fed. 257; Choctaw &c. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244; St. Louis &c. R. Co. v. Jackson, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328; Chicago &c. R. Co. v. Isom, 136 Ark. 624, 203 S. W. 271; Baltimore &c. R. Co. v. Elliott, 9 App. (D. C.) 341; Central R. &c. Co. v. Dickson, 82 Ga. 629, 10 S. E. 203; Louisville &c. R. Co. v. Elmore, 180 Ky. 733, 181 Ky. 227, 203 S. W. 876; Brookhaven Lumber Co. v. Illinois &c. R. Co., 68 Miss. 432, 10 So. 66; Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410; Philadelphia &c. R. Co. v. Huber, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439; Doyle v. Great Northern R. Co., 43 Wash. 558, 86 Pac. 861; Paine v. Eastern R. Co., 91 Wis. 340, 64 N. W. 1005.

[1] See note in 49 L. R. A. (N. S.) 527, citing and reviewing many cases. The general doctrine stated in the text is not confined to cases between employe and employer as the cases cited in the note to this section show, but applies to almost all classes of cases where the issue is negligence.

ciple and authority, as we believe, require the conclusion that, although the violation of a statute may give a right of action to one who is injured thereby, it does not, unless expressly or by necessary implication, so declared, give a right of action to one who is himself guilty of contributory negligence.[2]

§ 1883 (1315a). **Contributory negligence of engineer and fireman.**—Locomotive engineers and firemen, like other employes, are held only to the exercise of ordinary care and prudence,

[2] Lake Erie &c. R. Co. v. Craig, 73 Fed. 642; Victor Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378, 26 L. R. A. 435, 46 Am. St. 299; Wabash &c. R. Co. v. Cooper, 10 Ill. App. 271; Whitcomb v. Standard Oil Co., 153 Ind. 513, 55 N. E. 440; Linton &c. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Reynolds v. Hindman, 32 Iowa 146; Grand v. Michigan &c. R. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; Taylor v. Carew Manf. Co., 143 Mass. 470, 10 N. E. 308; Shea v. Boston &c. R. Co., 154 Mass. 31, 27 N. E. 672; Cassady v. Boston &c. R. Co., 164 Mass. 168, 40 N. E. 129; Johnson v. Chicago &c. R. Co., 29 Minn. 425, 13 N. W. 673; Swanson v. Osgood &c. Co., 91 Minn. 509, 98 N. W. 645; Durant v. Lexington &c. Mining Co., 97 Mo. 62; Spivay v. Osage &c. Mining Co., 88 Mo. 68; Dressie v. St. Louis &c. R. Co., 145 Mo. App. 163, 129 S. W. 1012; Chisholm v. Manhattan R. Co., 116 App. Div. 320, 101 N. Y. S. 622; Krause v. Morgan, 52 Ohio St. 662, 44 N. E. 1140; Mullhern v. Lehigh Coal Co., 161 Pa. St. 270, 28 Atl. 1087; Queen v. Dayton &c. R. Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. 935; Kilpatrick v. Grand Trunk R. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. 939; Curry v. Chicago &c. R. Co., 43 Wis. 665; Holum v. Chicago &c. R. Co., 80 Wis. 299, 50 N. W. 99; Thompson v. Edward P. Allis Co., 89 Wis. 523, 2 N. W. 527; Helmke v. Thilmany, 107 Wis. 216, 225, 83 N. W. 360. See also Denver &c. R. Co. v. Norgate, 141 Fed. 247, 259 (citing text and reviewing many authorities and announcing the same doctrine as to assumption of risks). Contra, Bartlett &c. Mining Co. v. Roach, 68 Ill. 174; Litchfield &c. Coal Co. v. Taylor, 81 Ill. 590; Caspar v. Lewin, 82 Kans. 604, 109 Pac. 657, 49 L. R. A. (N. S.) 526. See generally Carle v. Bangor &c. R. Co., 43 Maine 269; Sullivan v. Mississippi &c. R. Co., 11 Iowa 421. But it may prevent the doctrine of assumption of risks from applying. Chicago &c. R. Co. v. Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768 (authorized ordinance); Chicago &c. R. Co. v. Voelker, 129 Fed. 522, 70 L. R. A. 264; Pittsburg &c. R. Co. v. Leightheiser, 168 Ind. 438, 78 N. E. 1033, 11 Ann. Cas. 879. It is generally held that there is no assumption of risk of violation of safety appliance statutes. Luken v. Lake Shore &c. R. Co.,

under the circumstances, for their safety.[3] An engineer can not recover for injuries from an obstruction on the track which he could have seen if he had kept a vigilant and proper outlook.[4] On the question whether such vigilance was exercised the jury may take into consideration the other duties the engineer was required to perform at the time and which interfered with his keeping a lookout.[5] These employes generally have a right to assume that the track is in good condition unless they have actual knowledge to the contrary,[6] and that the locomotive and tender furnished are reasonably safe, and they are not required to subject them to a close and critical examination to find defects.[7] It has been held that the railroad company carries the burden of proof in such cases that the engineer or fireman knew of the existence of the defects.[8] The engineer

248 Ill. 377, 94 N. E. 175, 140 Am. St. 220, 21 Ann. Cas. 82; St. Louis &c. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061. And a statute may abolish or modify the doctrine of contributory negligence in cases involving a violation of the statute. Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. ed. 875; Seaboard Air Line R. Co. v. Hunt, 10 Ga. App. 273, 73 S. E. 588; Horton v. Seaboard &c. R. Co., 157 N. Car. 146, 72 S. E. 958; Chicago &c. R. Co. v. Ward (Okla.), 173 Pac. 212; Galveston &c. R. Co. v. Grenig (Tex. Civ. App.), 142 S. W. 135.

[3] Cincinnati &c. R. Co. v. Silvers (Ky. App.), 126 S. W. 120; Hall v. Chicago &c. R. Co., 46 Minn. 439, 49 N. W. 239; International &c. R. Co. v. Brice, 100 Tex. 203, 97 S. W. 461; Gulf &c. R. Co. v. Boyce, 39 Tex. Civ. App. 195, 87 S. W. 395. See also St. Louis &c. R. Co. v. Phillips, 165 Ala. 504, 51 So. 638. But see where fireman was held not guilty of contributory negligence, Choctaw &c. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768.

[4] Louisville &c. R. Co. v. Fitzgerald, 161 Ala. 397, 49 So. 860; Williams v. Norfolk &c. R. Co., 89 Va. 165, 15 S. E. 522. But see where storm prevented his seeing an obstruction, Grand Trunk &c. R. Co. v. Melrose, 166 Ind. 658, 78 N. E. 190.

[5] Central R. &c. Co. v. Kent, 87 Ga. 402, 13 S. E. 502.

[6] Western R. Co. v. Russell, 144 Ala. 142, 39 So. 311, 113 Am. St. 24; Southern R. Co. v. Sittasen, 166 Ind. App. 257, 74 N. E. 898; Southern R. Co. v. Bufkins, 45 Ind. App. 80, 89 N. E. 326; Smith v. Chicago &c. R. Co., 82 Kans. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255 n. Southern Kansas R. Co. v. Sage, 98 Tex. 438, 80 S. W. 1038, reversed in 98 Tex. 438, 84 S. W. 814, but on other grounds.

[7] Texas &c. R. Co. v. Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809.

[8] Jackson Lumber Co. v. Cunningham, 141 Ala. 206, 37 So. 445.

may be adjudged guilty of contributory negligence where he surrenders control of his engine to a fireman, not shown to be competent to run it,[9] in unnecessarily leaving his place and occupying a position of danger in rounding a curve,[10] and in running his engine at a high and dangerous rate of speed around a curve.[11] It can not ordinarily be said as a matter of law that the engineer is guilty of negligence amounting to a want of ordinary care in following the direction of the conductor in charge of his train,[12] unless, as held in one case, the rules of the company make the conductor and engineer equally accountable where orders conflict with the rules or involve risk or hazard.[13] Since the fireman has no authority over the engineer or conductor he is not imputable with negligence in failing to object to the disobedience of orders by the engineer and conductor, and it seems that the principle is not affected by the fact that the rules of the company require the engineer to show his orders to the fireman, if they do not allow the fireman to disobey the orders of these superiors.[14] It has been held that a fireman was not to be imputed with contributory negligence as a matter of law, in going under his engine to clean out the ash-pan without putting out warning signals.[15] An engineer or fireman can not hold a railroad company liable for his injuries caused by sleeping at his post, when worn out by working an excessive number of hours without sleep where there is no statute involved and he was not required by the company to run overtime, but did so because of the extra pay.[16] It is not generally considered an act of contributory negligence, as a

[9] Louisville &c. R. Co. v. Scanlon, 22 Ky. L. 1400, 60 S. W. 643.

[10] Strange v. Wrightsville &c. R. Co., 133 Ga. 730, 66 S. E. 744.

[11] Galveston &c. R. Co. v. Gillespie, 48 Tex. Civ. App. 56, 106 S. W. 707. See also Jennett v. Louisville &c. R. Co., 162 Fed. 392.

[12] Sprague v. New York &c. R. Co., 68 Conn. 345, 36 Atl. 791. Snipes v. Southern R. Co., 166 Fed. 1. See also Wilson v. Southern R. Co., 73 S. Car. 481, 53 S. E. 968.

[13] York v. Chicago &c. R. Co., 98 Iowa 544, 67 N. W. 574.

[14] Haas v. Chicago &c. R. Co., 90 Iowa 259, 57 N. W. 894.

[15] Chicago &c. R. Co. v. Stephenson, 33 Ind. App. 95, 69 N. E. 270.

[16] Smith v. Atchison &c. R. Co., 39 Tex. Civ. App. 468, 87 S. W. 1052; Nattress v. Philadelphia &c. R. Co., 150 Pa. 527, 24 Atl. 753.

matter of law, for an engineer to remain on his locomotive after reversing his engine, though he could have escaped without injury by jumping before the collision occurred.[17]

§ 1884 (1315b). **Contributory negligence of conductor.** — It may be said that a conductor fully acquainted with the operation of his train, and the dangers of a particular method of operation, and the means of avoiding dangers therefrom, will ordinarily be charged with contributory negligence where he fails to adopt such means.[18] It is the duty of the conductor to see that rules and orders for the government of other employes under his control are obeyed.[19] He can not recover for injuries received as the result of the disobedience of orders, though given by a superior, when he knows that such superior has no special information authorizing him to sanction the violation of the order.[20] He is plainly guilty of contributory negligence defeating a recovery for injuries the result of disregarding signals and acting on information given him by other persons.[21] He will not, however, be charged with contributory negligence as a matter of law in failing to make an inspection of the cars composing his train, where the railroad company has provided an inspector to perform this duty and such in-

[17] Cottrill v. Chicago &c. R. Co., 47 Wis. 634, 3 N. W. 376; Pennsylvania Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; Smith v. Wrightsville &c. R. Co., 83 Ga. 671, 10 S. E. 361. See also Furlow v. United Oil Mills, 104 Ark. 489, 149 S. W. 69, 45 L. R. A. (N. S.) 372; Kerlin v. Chicago &c. R. Co., 149 Iowa 440, 128 N. W. 548; Lloyd v. North Carolina R. Co., 151 N. Car. 536, 66 S. E. 604, 45 L. R. A. (N. S.) 378 (employe can not recover when he violates a statute making it a misdemeanor to work overtime). But compare Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. 389; McCrary v. Southern R. Co., 83 S. Car. 103, 65 S. E. 3, 18 Ann. Cas. 840.

[18] Moules v. Delaware &c. R. Co., 141 Pa. St. 632, 21 Atl. 733.

[19] Frounfelker v. Delaware &c. R. Co., 48 App. Div. (N. Y.) 206, 62 N. Y. S. 840; Missouri &c. R. Co. v. Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323.

[20] Westcott v. New York &c. R. Co., 153 Mass. 460, 27 N. E. 10. But compare Machren v. Great Northern R. Co., 98 Minn. 375, 107 N. W. 951; Wiley v. St. Joseph &c. Co., 132 Mo. App. 380, 111 S. W. 1185.

[21] Hannibal &c. R. Co. v. Kanaley, 39 Kans. 1, 17 Pac. 324. See also Louisville &c. R. Co. v. Moran, 148 Ky. 418, 146 S. W. 1131.

spector actually inspected the train before it was turned over to the conductor.[22]

§ 1885. Contributory negligence of flagmen and watchmen.—Flagmen and watchmen have often been held guilty of contributory negligence defeating a recovery by them. Thus, where such an employe unnecessarily goes upon a track without looking or listening he is usually guilty of negligence that will defeat recovery by him for injury of which it is a proximate cause notwithstanding the company was also guilty of negligence in running its train at unlawful speed or without giving warning or the like.[23] And this rule has been given particular application and force where he failed to see the very train which it was his special duty to flag or look out for.[24] It has also been held that the mere fact that a flagman at a crossing is charged with the duty of caring for switch lights does not make it any the less his duty to keep a lookout for trains.[25] But here, as elsewhere, the nature of his duties requiring close attention to their performance, or an emergency, or the like, may relieve, or tend to relieve, him from what might otherwise be considered contributory negligence and make the question one for the jury to determine under the circumstances of the particular case.[26]

[22] Barksdale v. Charleston R. Co., 66 S. Car. 204, 44 S. E. 743. See also generally Louisville &c. R. Co. v. Irby, 141 Ky. 145, 132 S. W. 393; Raab v. Hudson River &c. Co., 139 App. Div. 286, 123 N. Y. S. 1037.

[23] Louisville &c. R. Co. v. Crawford, 89 Ala. 240, 8 So. 243, 18 Am. St. 103; Alabama &c. R. Co. v. McWhorter, 156 Ala. 269, 47 So. 84; Ruane v. Lake Shore &c. R. Co., 64 Ill. App. 359; Coleman v. Pittsburg &c. R. Co., 139 Ky. 559, 63 S. W. 39; Terrell v. New York &c. R. Co., 180 Mass. 490, 62 N. E. 745; Illinois Cent. R. Co. v. Comfort, 97 Miss. 871, 53 So. 422.

[24] Louisville &c. R. Co. v. Crawford, 89 Ala. 240, 8 So. 243; Ellis v. Louisville &c. R. Co., 155 Ky. 745, 160 S. W. 512; St. Louis &c. R. Co. v. Finley, 122 Tenn. 127, 118 S. W. 692, 18 Ann. Cas. 1141.

[25] Conniff v. Louisville &c. R. Co., 124 Ky. 763, 99 S. W. 1154.

[26] Central of Ga. R. Co. v. Allen, 140 Ga. 333, 78 S. E. 1052; Erickson v. Kansas City &c. R. Co., 171 Mo. 647, 71 S. W. 1022, 94 Am. St. 802; Wolfe v. Seaboard &c. R. Co., 154 N. Car. 569, 70 S. E. 993; Pittsburg &c. R. Co. v. Lynch, 69 Ohio St. 123, 68 N. E. 703, 63 L. R. A. 504,

§ 1886 (1315c). Contributory negligence of section men and track laborers.—Section men and trackmen are required to exercise, for their own safety, that degree of care which ordinarily prudent men would exercise under like circumstances.[27] The nature of their work renders it impossible for them to keep a constant lookout for approaching trains.[28] This is not required, and it has even been held that such laborers have a right to become engrossed in their labor to such an extent that they may be oblivious of the approach of trains.[29] So, it can not be said as a matter of law that it is the duty of a track repairer engaged in tamping gravel under a tie to constantly look and listen for trains coming from behind him, where it is customary to give signals to such laborers.[30] The law, it is said, charges the railroad company with the duty of active vigilance towards such persons, and they have a right to rely to some extent upon the warnings from their foremen and the engineers of approaching trains.[31] But, as a general rule, under ordinary

100 Am. St. 658; Missouri &c. R. Co. v. Goss, 31 Tex. Civ. App. 300, 72 S. W. 94.

[27] Britton v. Northern Pac. R. Co., 47 Minn. 340, 50 N. W. 231; Harrison v. Texas &c. R. Co. (Tex. Civ. App.), 31 S. W. 242. See also Santire v. New York &c. R. Co., 203 Mass. 437, 89 N. E. 619, 24 L. R. A. (N. S.) 1304; Degonia v. St. Louis &c. R. Co., 224 Mo. 564, 123 S. W. 807; Van Dyke v. Missouri Pac. R. Co., 230 Mo. 259, 130 S. W. 1.

[28] Noonan v. New York &c. R. Co., 16 N. Y. S. 678, 62 Hun (N. Y.) 618; Baltimore &c. R. Co. v. Peterson, 156 Ind. 364, 59 N. E. 1044; Pittsburg &c. R. Co. v. Rogers, 45 Ind. App. 230, 87 N. E. 28; Crowley v. Burlington &c. R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918; Wellington v. Pelletier, 173 Fed. 908, 19 Ann. Cas. 1173.

[29] Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163, affirmed in 119 Ill. 515, 10 N. E. 369.

[30] St. Louis &c. R. Co. v. Jackson, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328. See also Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; D'Agostino v. Pennsylvania R. Co., 72 N. J. L. 358, 60 Atl. 1113; Baccelli v. Delaware &c. R. Co., 138 App. Div. 623, 122 N. Y. S. 849. But compare Santore v. New York &c. R. Co., 203 Mass. 437, 89 N. E. 619, 24 L. R. A. (N. S.) 1304 (must not rely wholly on signals).

[31] Comstock v. Union Pac. R. Co., 56 Kans. 228, 42 Pac. 724; Kelly v. Union R. Co., 18 Mo. App. 151, affirmed in 95 Mo. 279, 8 S. W. 420. See also Egan v. Southern Pac. Co., 15 Cal. App. 766, 115 Pac. 939; Louisville &c. R. Co. v. Eversole, 178 Ky. 67, 198 S. W. 548,

circumstances, there is no duty to look out for and give warning to such employes.[32] It is their duty when not engaged in work demanding their close attention, to look and listen for approaching trains,[33] and where nothing obstructs the view of a track laborer, for a long distance, and the bell of the approaching engine is ringing, his failure to look out for trains on a track, known by him to be in constant use, has been held to amount to such negligence as to prevent a recovery.[34] Furthermore, he may be charged with negligence where he voluntarily disables himself from hearing by bundling up his head and making no use of his sight.[35] And there are many cases in which it is held generally that such an employe must look out for trains and keep out of the way.[36] It is likewise his duty to withdraw to a reasonable distance from the track, when a train is passing, so as to avoid injuries from coal or other articles likely to fall from the cars.[37]

L. R. A. 1918B, 211; Lake Shore &c. R. Co. v. Murphy, 50 Ohio St. 135, 33 N. E. 403; Smith v. Southern Pac. R. Co., 58 Ore. 22, 113 Pac. 41, Ann. Cas. 1913A, 434 n.

[32] Fritz v. Wabash R. Co., 118 Ill. App. 18; Land v. St. Louis &c. R. Co., 95 Kans. 441, 148 Pac. 612; Blankenship v. Norfolk &c. R. Co., 147 Ky. 260, 143 S. W. 995; Cincinnati &c. R. Co. v. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27 n; Leighton v. Wheeler, 106 Maine 450, 76 Atl. 916, L. R. A. 1916F, 561; Riccio v. New York &c. R. Co., 189 Mass. 358, 75 N. E. 704; Degonia v. St. Louis &c. R. Co., 224 Mo. 564, 123 S. W. 807; O'Brien v. Erie R. Co., 210 N. Y. 96, 103 N. E. 895.

[33] Pittsburg &c. R. Co. v. Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133.

[34] Columbus &c. R. Co. v. Burns, 9 Ohio C. C. 276. See also Evans v. Wabash R. Co., 178 Mo. 508, 77 S. W. 515.

[35] McCarty v. Baltimore &c. R. Co., 20 Ohio C. C. 536, 11 Ohio C. D. 229.

[36] Hoffard v. Illinois Cent. R. Co. 138 Iowa 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797; Dyerson v. Union Pac. R. Co., 74 Kans. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207; St. Jean v. Boston &c. R. Co., 170 Mass. 213, 48 N. E. 1088; Morris v. Boston &c. R. Co., 184 Mass. 368, 68 N. E. 680; Regan v. Boston &c. R. Co., 208 Mass. 520, 94 N. E. 691.

[37] Gulf &c. R. Co. v. Wood (Tex.), 63 S. W. 164; Illinois &c. R. Co. v. Stassen, 56 Ill. App. 221; Atchison &c. R. Co. v. Croll, 3 Kans. App. 242, 45 Pac. 112 (an extreme case). See also Card v. Eddy, 129 Mo. 510, 28 S. W. 979; Foster v. Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Chicago &c. R. Co. v. Cullen, 187 Ill. 523, 58 N. E. 455.

§ 1887 (1315d). **Contributory negligence in mounting or alighting from moving cars.**—The courts do not impute contributory negligence, as a matter of law, to the act of a trainman in mounting or alighting from moving cars, though they recognize the danger involved in the act.[38] What the law requires of the trainman is the exercise of ordinary and reasonable care, which is usually care commensurate with the danger. Contributory negligence has been imputed to an employe who attempted to board a moving train by the side ladder when he had an opportunity to board it by an end ladder while standing, and as a result of his want of care he suffered injuries by coming in contact with a car on another track;[39] to a brakeman who seized a grip-iron on the end of a flat-car, designed for use in making couplings, and attempted to step on a swinging brake-beam in order to ride to another car, and was killed by the grip-iron giving away and it was shown that there was a hand-hold on the side of the box-car next to the flat-car which he could have used without risk;[40] to a trainman who attempted, at night, to board a car, running at a speed of eight miles an hour, while he was encumbered with a lantern.[41] But contributory negligence will not generally be charged to an employe injured, while mounting cars, by reason of some latent defect in the appliances.[42] A brakeman is certainly wanting in reasonable care for his safety where he unnecessarily jumps from a moving train at a time when he cannot see where he will alight and he has knowledge of the existence of obstructions

[38] Kansas City &c. R. Co. v. Billingslea, 116 Fed. 335; Charlton v. St. Louis &c. R. Co., 200 Mo. 413, 98 S. W. 529; Heilig v. Southern R. Co., 152 N. Car. 469, 67 S. E. 1009.

[39] McDugan v. New York &c. R. Co., 155 N. Y. 631, affirming 31 N. Y. S. 135, 10 Misc. 336. And to a brakeman who stood on the track and attempted without any necessity to mount the front of an approaching engine. Pratt v. Southern R. Co., 165 Ala. 501, 51 So. 604; Louisville &c. R. Co. v. Young, 168 Ala. 551, 53 So. 213; Wise Terminal Co. v. McCormick, 104 Va. 400, 51 S. E. 731.

[40] Dawson v. Chicago &c. R. Co., 114 Fed. 870.

[41] Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546.

[42] Thompson v. Boston &c. R. Co., 153 Mass. 391, 26 N. E. 1070.

rendering his act dangerous.[43] So a brakeman will be held guilty of negligence where he steps from a moving car without noticing the direction in which it is moving and is injured in consequence of his carelessness.[44] It has also been held that where the act of alighting is dangerous for any reason to the knowledge of an employe doing so, his negligence will defeat a recovery for injuries received by him notwithstanding he acted in obedience to the command of a superior.[45]

§ 1888 (1315e). Contributory negligence in walking upon tracks.—Railroad men above other men know that a railroad track is a highly dangerous place for foot passengers, and it is their duty while so using the track to maintain a careful lookout for moving trains and particularly for trains that they know are scheduled to approach at these times.[46] They have no right to depend wholly on signals from approaching trains[47] or on persons in charge of such trains[48] to prevent accident. This duty of vigilance is particularly strong on switch-yard employes who know that switching is in actual progress at the time they are using the tracks.[49] But there is authority that yardmen have a right to rely on the custom of the railroad company as to the movement of its trains and engines in the

[43] Magee v. Chicago &c. R. Co., 89 Iowa 752, 56 N. W. 681. See also Martinson v. Northern Pac. R. Co., 107 Minn. 495, 120 N. W. 1086, 131 Am. St. 506.

[44] Kilpatrick v. Grand Trunk R. Co., 72 Vt. 263, 47 Atl. 827.

[45] McArthur Bros. Co. v. Troutt, 88 Ill. App. 638. But see Northern Pacific R. Co. v. Egeland, 56 Fed. 200; Vandalia R. Co. v. Kendall (Ind. App.), 119 N. E. 816.

[46] Pennsylvania Co. v. O'Shaugnessy, 122 Ind. 588, 23 N. E. 675; Bennett v. St. Louis &c. R. Co., 36 Tex. Civ. App. 459, 82 S. W. 333; Lewis v. Vicksburg &c. R. Co., 114 La. 161, 38 So. 92; O'Neil v. Pittsburg &c. R. Co., 130 Fed. 204; Black v. Missouri Pacific R. Co., 172 Mo. 177, 72 S. W. 559.

[47] Sours v. Great Northern R. Co., 84 Minn. 230, 87 N. W. 766.

[48] Keefe v. Chicago &c. R. Co., 92 Iowa 182, 60 N. W. 503; Clark v. New York &c. R. Co., 80 Hun 320, 30 N. Y. S. 126; Missouri &c. R. Co. v. Faber, 7 Kans. App. 481, 54 Pac. 136; Collins v. Burlington &c. R. Co., 83 Iowa 346, 49 N. W. 848.

[49] Wilber v. Wisconsin &c. R. Co., 86 Wis. 535, 57 N. W. 356. See also McCabe v. Bessemer &c. R. Co., 245 Pa. St. 573, 91 Atl. 957.

yard,[50] and that the operatives of such trains will observe speed laws and ordinances.[51]

§ 1889 (1315f). Contributory negligence in making "flying switches."—It has been held that a brakeman injured while assisting in the making of a "flying switch" was not to be charged with contributory negligence in participating in this dangerous act where the necessities of the case demanded that the switch should be made that way,[52] though he violated the rules of the company in doing so.[53] But the railroad company was absolved from liability for the death of a section hand on the ground of contributory negligence where it was shown that he stood on the track with his back toward the engine, when he knew that a car was about to be sent along the track on which he was standing, by this method.[54] In another case it was held that a night watchman was not chargeable with contributory negligence in failing to anticipate the throwing of cars onto a repair track by means of a flying switch where there was no light on the cars and no notice was given of their approach, and the switch was made by an engine which was pushing as well as drawing cars.[55] Yard employes acquainted with a custom in the yard to "kick" cars backward without a brakeman or lookout, are generally charged with negligence in failing to keep a lookout for cars switched in this way.[56] It has been held that a general order from a conductor to a flag-

[50] Graham v. Minneapolis &c. R. Co., 95 Minn. 49, 103 N. W. 714.

[51] Camp v. Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735.

[52] St. Louis &c. R. Co. v. French, 56 Kans. 584, 44 Pac. 12; Dooner v. Delaware &c. Canal Co., 164 Pa. St. 17, 30 Atl. 269. See also Allen v. Atlantic &c. R. Co., 145 N. Car. 214, 58 S. E. 1081.

[53] Union Pacific R. Co. v. Springsteen, 41 Kans. 724, 21 Pac. 774; Louisville &c. R. Co. v. Tucker, 105 Ky. 492, 20 Ky. L. 1303, 49 S. W. 314. But see Williams v. Illinois Central R. Co., 114 La. 13, 37 So. 992, where contributory negligence was imputed to one injured by his own carelessness in making a "flying switch" which was forbidden by the rules of the company when avoidable.

[54] Union Pacific R. Co. v. Clark, 51 Nebr. 220, 70 N. W. 923.

[55] Galveston &c. R. Co. v. Hynes, 21 Tex. Civ. App. 34, 50 S. W. 624.

[56] Schaible v. Lake Shore &c. R. Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660.

man to catch a car about to be kicked, did not justify the flagman in doing so when the car was moving at an obviously dangerous rate of speed, and this especially where the conductor at the time of giving the order did not know that the speed would be unusual, and he was not present when the flagman attempted to obey the order.[57]

§ 1890 (1315g). Injuries to street railway employes. — The general principles of the law of master and servant adapt themselves to the operation of street railways. These principles call for no restatement at this time and we shall content ourselves by collecting some recent holdings which apply and illustrate these principles. It is held, for example, that it is the duty of a street railway company to sand its tracks on steep grades and that it is guilty of negligence where it fails to do so;[58] that it is negligence to equip a car with a brake so defective that the speed of the car can not be controlled at places where the grade is heavy;[59] that knowledge of a defective brake is presumed where the condition has existed for a considerable length of time—in this instance more than a month;[60] that it is negligence to place a pole so near the track that it endangers the safety of a conductor passing along the running board to collect fares;[61] that it is negligence to construct double tracks so close together that when cars pass, the conductor, standing on the running board of a car in the performance of his duties, will be struck by a car coming from the opposite direction on the adjoining

[57] Whatley v. Macon &c. R. Co., 104 Ga. 764, 30 S. E. 1003.

[58] Union Trac. Co. v. Buckland, 34 Ind. App. 420, 72 N. E. 158.

[59] Terre Haute Elec. Co. v. Kiely, 35 Ind. App. 180, 72 N. E. 658. See also Newhart v. St. Paul City R. Co., 51 Minn. 42, 52 N. W. 983. But see for instruction held erroneous, Corsick v. Boston &c. E. Ry. Co., 218 Mass. 144, 105 N. E. 600.

[60] Houts v. St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161.

[61] Withee v. Somerset Traction Co., 98 Maine 61, 56 Atl. 204. It is generally held not only that it is negligence to place one pole dangerously nearer than the others but also that the risk if unknown is not assumed. Pikesville R. &c. Co. v. State, 88 Md. 563, 42 Atl. 214; Hoffmeier v. Kansas City &c. R. Co., 68 Kans. 831, 75 Pac. 1117; Finley v. Louisville &c. R. Co., 31 Ky. L. 740, 103 S. W. 343. But in other cases the risk has been held to have been assumed. Kath v. East St. Louis &c. R. Co., 232 Ill.

track;[62] that a street railway company is chargeable with negligence where it furnishes its employes a car that starts with a lunge when the current is turned on, so that the employes have to brace themselves to avoid being hurt when it starts.[63] But a street railway company rests under no duty to a conductor to equip a trailer with a fender or life guard to guard against injuries to him from being thrown under the car in case he should fall between the cars in passing from one car to another—an application of the rule that the master is only bound to see that the machinery which he employs is reasonably safe and suitable, and while the want of a fender may have enhanced the risk, it did not constitute a defect in the construction of the car rendering it unsafe or unsuitable for the purpose in which it was employed.[64] Neither is a street railway company required to keep a light burning at a curve in the track to warn motormen to reduce the speed of their cars before turning the curve. "It is a matter of common knowledge," says the court, "that headlights are the means provided to enable motormen and engineers to detect curves and other obstacles on railway tracks."[65]

§ 1891 (1315h). Contributory negligence of street railway employes.—A motorman is bound to keep a lookout for other street cars at crossings and he will be charged with contributory negligence where he fails to do so and as a result thereof he is injured by a collision of his car with another on the crossing.[66] He is likewise required to take the same precaution at railroad crossings, though the conductor has gone ahead, and he will be charged with contributory negligence where a colli-

126, 83 N. E. 533, 15 L. R. A. (N. S.) 1109 n; Ladd v. Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730.

[62] True v. Niagara Gorge R. Co., 70 App. Div. 383, 75 N. Y. S. 216, affirmed in 175 N. Y. 487, 67 N. E. 1090. Compare also Southern Pac. R. Co. v. Birkshire (U. S.), 41 Sup. Ct. 162.

[63] Murdock v. Oakland, 128 Cal. 22, 60 Pac. 469.

[64] Relyea v. Kansas City &c. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817.

[65] Godfrey v. St. Louis Transit Co., 107 Mo. App. 193, 81 S. W. 1230.

[66] Bobb v. Union Trac. Co., 206 Pa. St. 265, 55 Atl. 972.

sion with a railroad train could have been avoided had he looked, and this more particularly where there is no rule of the street railway company requiring a motorman to rely solely on the conductor's signal at railroad crossings.[67] So he will be charged with contributory negligence where he drives his car at such a rate that he cannot stop in time to prevent collision with a vehicle in plain view and going in the same direction.[68] In running his car backward to meet another car, it is his duty to run slowly and watch constantly, and a failure to do so may amount to negligence defeating a recovery for injuries received by him in a collision with the rear car.[69] A conductor may be charged with contributory negligence where he stands on the running board of an open car on the side next to the trolley posts without looking to see whether this can be done with safety.[70] In a comparatively recent case where a motorman was injured by the negligent act of his foreman in moving the car while he was away from it, it was held a question for the jury whether the motorman, who had removed his controller handle from the socket, was guilty of contributory negligence in not carrying his controller handle with him.

[67] McLeod v. Chicago &c. R. Co., 125 Iowa 270, 101 N. W. 77.

[68] La Pontney v. Shedden Cartage Co., 116 Mich. 514, 74 N. W. 712. See also Savage v. Nassau Elec. R. Co., 42 App. Div. 241, 59 N. Y. S. 225; Rittenhouse v. Wilmington St. R. Co., 120 N. Car. 544, 26 S. E. 922. (Car running at excessive speed over bridge in violation of rules of company.)

[69] Hudson v. Peoples St. R. Co., 175 Mass. 23, 55 N. E. 464.

[70] Ladd v. Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730. See also Sundy v. Savannah St. R. Co., 96 Ga. 819, 23 S. E. 841. But this must often be a question for the jury and can hardly be correctly stated as a matter of law in all cases. Pikesville &c. R. Co. v. State, 88 Md. 563, 42 Atl. 214; Pierce v. Camden &c. R. Co., 58 N. J. L. 400, 35 Atl. 286. See also True v. Niagara Gorge R. Co., 70 App. Div. 383, 75 N. Y. S. 216, where it is held that a conductor engrossed in the duty of collecting fares on the running board and struck by another car at the only point in the line where the tracks were too close to allow one with safety to so stand, was not guilty of contributory negligence as a matter of law, it appearing that he was not warned of the danger at this point or the approach of the other car.

as required by the rules of the company, instead of leaving it lying on the controller to be picked up and used by any person coming aboard.[71]

[71] Bein v. St. Louis Transit Co., 108 Mo. App. 399, 83 S. W. 986. This seems to be questionable, if this violation of the rule was a proximate cause of his injury, but the question of proximate cause may well have been for the jury.

CHAPTER LVI

FELLOW SERVANTS

Sec.
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§ 1895 (1316). Survey of the fellow-servant rule—General doctrine.—The English courts for many years gave almost unlimited effect to the doctrine of respondeat superior and held the common master liable to a servant for the negligence of a fellow servant. The decision in one case wrought a radical and far-sweeping change.[1] As often happens, the courts, in swinging from one extreme, swung to the other. The English case to which we have referred carried the doctrine beyond the limits of right reason, but it was for a time very generally followed, in all its scope, both in England and America,[2] and its doctrine

[1] Priestly v. Fowler, 3 Mees. & W. 1.

[2] King v. Ohio &c. R. Co., 14 Fed. 277; Kenney v. Central R.

yet prevails—not, however, in its full force and extent, for it has been greatly limited and modified by the modern decisions. It is still the rule of the common law that if the employer exercises ordinary care to select competent servants he is not liable to a servant for injuries caused by the negligence of a fellow servant.[3] The Supreme Court of the United States for a time

Co., 61 Ga. 590; Columbus &c. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615 and note. Carle v. Bangor &c. R. Co., 43 Maine 269; Yates v. McCullough &c. R. Co., 69 Md. 370, 16 Atl. 280; Farwell v. Boston &c. R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339 and note; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. 441 and note; Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Russell v. Hudson River &c. R. Co., 17 N. Y. 134; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Murray v. South Carolina R. Co., 1 McMullen (S. Car.), 385, 36 Am. Dec. 268 and note; Robinson v. Houston &c. R. Co., 46 Tex. 540; Hard v. Vermont &c. Ry. Co., 32 Vt. 473; Schultz v. Chicago &c. R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881; Hutchinson v. York &c. R. Co., 5 Exch. 343, 19 L. J. R. Exch. 296; McEniry v. Waterford &c. R. Co., 8 Ir. C. L. R. 312; Bartonshill &c. Co. v. Reid, 3 Macq. 266.

[3] Hobson v. New Mexico &c. R. Co., 2 Ariz. 171, 11 Pac. 545, 28 Am. & Eng. R. Cas. 360; Brown v. Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8; Crusselle v. Pugh, 67 Ga. 430, 44 Am. Rep. 724; Palmer v. Utah &c. R. Co., 2 Idaho 290, 13 Pac. 425; Indianapolis &c. R. Co. v. Johnson, 102 Ind. 352, 26 N. E. 200; Hannibal &c. R. Co. v. Fox, 31 Kans. 587, 3 Pac. 320, 15 Am. & Eng. R. Cas. 325; Louisville &c. R. Co. v. Cavens, 9 Bush. (Ky.) 559; Burlington &c. R. Co. v. Crockett, 19 Nebr. 138, 26 N. W. 921; Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148 and note; Murphy v. Boston &c. R. Co., 88 N. Y. 146, 42 Am. Rep. 240; Berea &c. Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; Willis v. Oregon &c. R. Co., 11 Ore. 257, 4 Pac. 121; Lawler v. Androscoggin &c. R. Co., 62 Maine 463, 16 Am. Rep. 492 and note; Blake v. Maine &c. R. Co., 70 Maine 60, 35 Am. Rep. 297; Hanrathy v. Northern &c. R. Co., 46 Md. 280; Johnston v. Boston &c. R. Co., 135 Mass. 209, 46 Am. Rep. 458; McGee v. Boston &c. Co., 139 Mass. 445, 1 N. E. 745; Fratto v. Boston Elev. Ry. Co., 230 Mass. 388, 119 N. E. 659; Joslin v. Grand Rapids &c. R. Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Brown v. Winona &c. R. Co., 27 Minn. 162, 6 N. W. 484, 38 Am. Rep. 285; Gibson v. Pacific &c. R. Co., 46 Mo. 163, 2 Am. Rep. 497; Keystone Bridge Co. v. Newberry, 69 Pa. St. 246, 42 Am. Rep. 543; Nashville &c. R. Co. v. Wheless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317; Davis v. Central &c. R. Co., 55 Vt. 84, 11 Am. & Eng. R. Cas. 173; Moon v. Richmond &c. R. Co., 78 Va. 745, 49 Am. Rep. 401 and note, 17 Am. & Eng. R. Cas. 531; Riley v. West Va. &c. R. Co., 27 W. Va. 145;

departed[4] to some extent from the fellow-servant rule, but the later cases have practically asserted and enforced it.[5] The principal point of difference between the doctrine of non-liability for the negligence of fellow servants, as originally declared, and the rule now generally accepted, is that the latter rule recognizes the doctrine of superior agents or vice principals and subordinate employes, which the original rule practically denied.[6] The great weight of modern authority is that an employe entrusted with duties resting upon the master may be a vice-principal and as such impose a liability upon the common master to an employe injured by his negligence. If the employes or servants are co-employes or fellow servants, engaged in the same general undertaking to accomplish the same general purpose, exercising delegable duties, and not subordinates and superiors, then the fellow-servant rule is still the rule in the

Peschel v. Chicago &c. R. Co., 62 Wis. 338, 21 N. W. 269, 17 Am. & Eng. R. Cas. 545; 4 Thomp. Neg. § 4846; White's Supp. to Thomp. Neg. § 4846. But statutes in many jurisdictions and recent acts of congress have changed the rule in many respects as will be shown in the next chapter.

[4] Chicago Mil. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. ed. 787.

[5] Baltimore & R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. ed. 181; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994; Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006.

[6] We do not mean simply a difference in rank, by the term "superior agent," but we mean to denote by the term "superior agent" one who is entrusted with the performance of the duties of the master. There are, however, well-reasoned cases which hold that a bare difference in rank breaks the force of the fellow-servant rule. Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Chicago &c. R. Co. v. May, 108 Ill. 288; Missouri &c. R. Co. v. Peregoy, 36 Kans. 424, 14 Pac. 7; Kentucky Central &c. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691, 12 Am. St. 480; Chicago &c. R. Co. v. Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Patton v. Western &c. R. Co., 96 N. Car. 455, 1 S. E. 863, 31 Am. & Eng. R. Cas. 298; Louisville &c. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866. See also East Tenn. &c. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883; Highland Ave. R. Co. v. Dusenberry, 98 Ala. 239, 13 So. 308; Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Volz v. Chesapeake &c. R. Co., 95 Ky. 188, 24 S. W. 119; Louisville &c. R. Co. v. Lowe (Ky.), 66 S. W. 736; Slette v. Great

absence of legislative enactment.[7] There is, however, a wide diversity of opinion as to who are fellow servants, although there is little, if any, substantial conflict as to the rule where the relation is clearly that of fellow servants. The dispute falls upon the question who are and who are not to be regarded as fellow servants rather than upon the rule that governs where the relation of fellow servants exists. It is impossible to reconcile the conflict upon the question as to who are and who are not to be regarded as fellow servants, or to say what is the true test for determining who is or is not a vice-principal. It is, however, now pretty generally agreed in most jurisdictions that the rank of the employe does not determine the question, for,

Northern R. Co., 53 Minn. 341, 55 N. W. 137; Cook v. Hannibal &c. R. Co., 63 Mo. 397; Stephens v. Hannibal &c. R. Co., 86 Mo. 221; Sullivan v. Hannibal &c. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. 388; Nix v. Texas &c. R. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. 897. But we think that the weight of authority at present, as well as reason, is that the bare fact that one employe is superior in rank to another does not necessarily break the force of the fellow-servant rule, and that it is only where the employe is entrusted with some duty resting upon the master that the weight of authority justifies the conclusion that he is not a co-employe but a superior agent.

[7] Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 684, 48 L. ed. 1006; New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. ed. 181; Eichhorn v. Central R. Co., 185 Fed. 624; Illinois Cent. R. Co. v. Hart, 176 Fed. 245, 52 L. R. A. (N. S.) 1117 and note; Borgman v. Omaha &c. R. Co., 41 Fed. 667; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728, 17 L. R. A. 190; Stevens v. Chamberlin, 100 Fed. 378, 51 L. R. A. 513 and elaborate note; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Colorado &c. R. Co. v. Naylon, 17 Colo. 501, 30 Pac. 249, 31 Am. St. 335; Darrigan v. New York &c. R. Co., 52 Conn. 285, 52 Am. Rep. 590; Chicago &c. R. Co. v. May, 108 Ill. 288; New Pittsburg &c. Co. v. Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; Indianapolis Trac. &c. Co. v. Mathews, 177 Ind. 88, 97 N. E. 320; Schroeder v. Flint &c. R. Co., 103 Mich. 213, 61 N. W. 663, 29 L. R. A. 321, 50 Am. St. 354; Wickham v. Detroit United Ry., 160 Mich. 277, 125 N. W. 22, 52 L. R. A. (N. S.) 1082 and note, 136 Am. St. 436, Ann. Cas. 1913E, 1069; Givens v. Southern Ry., 94 Miss. 830, 49 So. 180, 22 L. R. A. (N. S.) 971; Dixon v. Chicago &c. R. Co., 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; Flike v. Boston &c. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Hankins v. New York &c. R. Co., 142 N. Y. 416, 37 N. E. 466, 25 L.

if an employe is charged with the performance of a duty that the law imposes on the master, so that it can not be delegated, as to that particular duty the employe is a vice-principal.[8] But in applying this doctrine there is a conflict of authority that leads to hopeless confusion. The confusion deepens as the adjudged cases are studied, for there are a variety of opinions as to what are or are not the master's duties in such a sense as to make the person to whom their performance is entrusted a superior agent; so there is upon the question of the necessity of consociation in service to create the relation of fellow servants, and so there is in relation to what is called the departmental theory. We cannot hope to do much towards clearing away the obscurity that clouds the subject, nor can we do more in view of the multitude of cases than refer to some of them which seem to us to best illustrate the important phases of the subject and bring into clear light its principal features.

R. A. 396, 40 Am. St. 616; Keenan v. New York &c. R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. 604; Ell v. Northern Pac. R. Co., 1 N. Dak. 336, 48 N. W. 222, 26 Am. St. 621, 12 L. R. A. 91; Anderson v. Bennett, 16 Ore. 515, 19 Pac. 765, 8 Am. St. 311; Allegheny &c. R. Co. v. Rohan, 118 Pa. St. 223, 11 Atl. 789; Louisville &c. R. Co. v. Dillard, 114 Tenn. 240, 86 S. W. 313; Heine v. Chicago &c. R. Co., 58 Wis. 525, 17 N. W. 420. But the master can not escape liability by attempting to delegate a non-delegable or non-assignable duty.

[8] Hough v. Texas &c. R. Co., 100 U. S. 213, 218, 25 L. ed. 612. Lafayette Bridge Co. v. Olsen, 108 Fed. 335, 54 L. R. A. 33 and elaborate note; Smoot v. Mobile &c. R. Co., 67 Ala. 13; Alabama Great So. R. Co. v. Vail, 142 Ala. 134, 38 So. 124; Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264 and note; Kansas City &c. R. Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. 78, 46 L. R. A. 814; Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Denver &c. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Foster v. Pusey, 8 Houst. (Del.) 168, 14 Atl. 545; Indiana Car Co. v. Parker, 100 Ind. 181; Indiana &c. R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Indiana Un. Trac. Co. v. Long, 176 Ind. 532, 96 N. E. 604; Cleveland &c. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594; Atchison &c. R. Co. v. Moore, 29 Kans. 632; Hannibal &c. R. Co. v. Fox, 31 Kans. 587, 3 Pac. 320, 15 Am. & Eng. R. Cas. 325; Louisville &c. R. Co. v. Cavens, 9 Bush. (Ky.) 559; Towns v. Vicksburg &c. R. Co., 37 La. Ann. 630, 55 Am. Rep. 508; Philadelphia &c. R. Co. v. Devers, 101 Md. 341, 61 Atl. 418; Ford v. Fitchburg &c. R. Co., 110 Mass. 240, 14 Am. Rep. 598; McLean v. Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748; Brothers v. Cartter, 52 Mo. 373, 14 Am. Rep.

§ 1896 (1317). **Vice-principal — Superior agent.** — The term "vice-principal" is generally used to denote an employe to whom the employer has entrusted the performance of a duty which the law requires the employer himself to perform. We think that an employe who is entrusted generally with the performance of the master's duties, or is entrusted with the performance of some of the master's duties, such as can not be delegated so as to relieve the master from responsibility, although such employe may not be entrusted with all the duties of the employer, is as to such matters a superior agent or vice-principal, and that superiority in rank, on the one hand, does not necessarily make one a vice-principal, nor does the fact that employes are in a sense engaged in a common employment, on the other hand, necessarily prevent one of them from being a vice-principal.[9] We believe that where the duty which the law imposes

424; D'Agostino v. Pennsylvania R. Co., 72 N. J. L. 358, 60 Atl. 1113; McCosker v. Long Island R. Co., 84 N. Y. 77; Mason v. Richmond &c. R. Co., 111 N. Car. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. 814; Anderson v. Bennett, 16 Ore. 515, 19 Pac. 765, 8 Am. St. 311; Mullan v. Philadelphia &c. R. Co., 78 Pa. St. 25, 21 Am. Rep. 2; Brodeur v. Valley Falls &c. R. Co., 16 R. I. 448, 17 Atl. 54; Gunter v. Graniteville &c. R. Co., 18 S. Car. 262, 44 Am. Rep. 573; Calvo v. Railroad Co., 23 S. Car. 526, 55 Am. Rep. 28, 28 Am. & Eng. R. Cas. 327; Nashville &c. R. Co. v. Handman, 13 Lea (Tenn.) 423; Gann v. Nashville &c. R. Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. 687; Merrill v. Oregon Short Line R. Co., 29 Utah 254, 81 Pac. 85; Norfolk &c. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Sayward v. Carlson, 1 Wash. St. 29, 23 Pac. 830; Schultz v. Chicago &c. R. Co., 48 Wis. 375, 4 N. W. 399; McBride v. Union Pac. R. Co., 3 Wyo. 247, 21 Pac. 687; Wilson v. Merry, L. R. 1 H. L. Sc. 326. Note in 51 L. R. A. 513, 588, et seq.; Thomp. Neg. § 4924; White's Supp. to Thomp. Neg. §§ 4923, 4924, 4938; note in 52 L. R. A. (N. S.) 1082, et seq.

[9] See generally Halverson v. Nisen, 3 Sawy. (U. S.) 562; Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 Sup. Ct. 382, 33 L. ed. 651; Baltimore and Ohio R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Central &c. R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418; Quinn v. Lighterage Co., 23 Fed. 363; Anderson v. Winston, 31 Fed. 528; Clowes v. The Frank &c., 45 Fed. 494; Northern &c. R. Co. v. Peterson, 51 Fed. 182; Harley v. Louisville &c. R. Co., 57 Fed. 144; Thom v. Pittard, 62 Fed. 232; Deavers v. Spencer, 70 Fed. 480; Baltimore &c. R. Co. v. Root, 177 Fed. 200; Sullivan v. Railway Co., 62 Conn. 208, 25 Atl.

upon the employer is entrusted to an employe the employe is a vice-principal as to that duty, although the matter to which it relates may not be in the strict sense a general one. But we venture to express our opinion with much hesitation, for the difference among authors and judges is so wide that one is not safe in assuming to express his judgment. We believe that the rule we have ventured to state is the true one, although the employe may be, in conjunction with other employes, engaged in "a common employment under a common employer," for all persons engaged in a general line of business under a common employer, from general manager or general superintendent to a laborer, are in a common employment under a

711; Chicago Terminal &c. R. Co. v. Reddick, 230 Ill. 105, 82 N. E. 598; New Pittsburg &c. R. Co. v. Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; Bedford &c. R. Co. v. Brown, 142 Ind. 659, 42 N. E. 359; Cleveland &c. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594; Hardy v. Chicago &c. R. Co., 149 Iowa 41, 127 N. W. 1093; Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; Findlay v. Russell &c., 108 Mich. 286, 66 N. W. 50; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; Kelley v. Cable Co., 7 Mont. 70, 14 Pac. 633; Hofnagle v. New York &c. R. Co., 55 N. Y. 608; McCosker v. Long Island &c. R. Co., 84 N. Y. 77; Wooden v. Western &c. R. Co., 147 N. Y. 508, 42 N. E. 199; Ell v. Northern &c. R. Co., 1 N. Dak. 336, 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. 621, 43 Alb. L. J. 414; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 157, 23 Am. St. 160; Sloppy v. Pennsylvania R. Co., 228 Pa. St. 636, 77 Atl. 1010; Coal Creek &c. M. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387; Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Jones v. Old Dominion &c. Mills, 82 Va. 140, 3 Am. St. 92. See Calvo v. Charlotte &c. R. Co., 23 S. Car. 526, 55 Am. Rep. 28; Packet Co. v. McCue, 17 Wall. (U. S.) 508, 21 L. ed. 705; Railway Co. v. Fort, 17 Wall. (U. S.) 553, 21 L. ed. 739; Gilmore v. Northern &c. R. Co., 18 Fed. 866, 15 Am. & Eng. R. Cas. 304; Lalor v. Chicago &c. R. Co., 52 Ill. 401, 4 Am. Rep. 616; Atchison &c. R. Co. v. Moore, 31 Kans. 197, 15 Am. & Eng. R. Cas. 312; Tierney v. Minneapolis &c. R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; Brickner v. New York &c. R. Co., 2 Lans. (N. Y.) 506, 49 N. Y. 672; Anderson v. Bennett, 16 Oregon 515, 19 Pac. 765, 8 Am. St. 311; Mullen v. Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2; Johnson v. Union Pac. &c. Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506. Davis v. Central &c. R. Co., 55 Vt. 84, 45 Am. Rep. 590; Moon v. Richmond &c. R. Co., 78 Va. 745, 49 Am. Rep. 401. The text is cited in Peirce v. Oliver, 18 Ind. App. 87, 47 N. E. 485, 489.

common master, but it does not follow from that fact that the superintendent or manager may not be a vice-principal. The test of common employment recognized in many of the cases[10] is not a just one, nor is the test founded upon the bare fact that one employe is in some respects the superior of another.

§ 1897 (1318). Vice-principal — Superior agent — Illustrative cases.—An employe entrusted with the duty of instructing a young and inexperienced servant has been held to be a vice-principal upon the ground that the duty to instruct is that of the master.[11] The duty of opening and closing a switch is not

[10] Buckley v. Gould, 14 Fed. 833; Mobile &c. R. Co. v. Smith, 59 Ala. 245; Harrison v. Central &c. R. Co., 31 N. J. L. 293; Howells v. Steel Co., L. R. 10 Q. B. 62; Wilson v. Merry, L. R. 1 H. L. Cas. App. 326; Conway v. Belfast R. Co., Ir. 9 C. L. 498; Waller v. South Eastern &c. R. Co., 2 H. & C. 102. See also Chicago &c. R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. 216. We think, however, that the test of common employment may be a true one when qualified by the statement that where the employe is entrusted with a duty which the master is himself required to perform the employe is a superior agent. See Molhoff v. Chicago &c. R. Co., 15 Okla. 540, 82 Pac. 733; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994; Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418. The department theory, especially when one is given entire control over a separate and distinct department, is recognized in some cases of high authority, and under this theory the one in control is deemed a vice-principal as to those under him or, when coupled with the consociation theory, those in different departments are not regarded as fellow-servants. See Baltimore &c. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 919, 37 L. ed. 772; Thompson &c. Co. v. Fitzgerald, 149 Fed. 721; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Milton v. Frankfort &c. Trac. Co., 139 Ky. 53, 129 S. W. 322; Church v. Chicago &c. R. Co., 119 Mo. 203, 23 S. W. 1056; Betchman v. Seaboard &c. R. Co., 75 S. Car. 68, 55 S. E. 140, 117 Am. St. 885 n, 9 Ann. Cas. 1003; Louisville &c. R. Co. v. Dillard, 114 Tenn. 240, 86 S. W. 313, 108 Am. St. 894, 896, reviewing other Tennessee cases, some of which make an extreme application of the doctrine. Louisville &c. R. Co. v. Edmunds, 23 Ky. L. 1049, 64 S. W. 727 (also extreme).

[11] Wallace v. Standard Oil Co., 66 Fed. 260; Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720; Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. 138; Newbury v. Getchel &c. Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. 582. See Minneapolis v. Lundin, 58 Fed. 525;

a duty of the employer, but it is a duty relating to the operation of the road, and the person to whom it is entrusted is not a superior agent or vice-principal.[12] An employe entrusted with the duty of providing and keeping safe the place where employes are required to work, by their contract of employment, is a superior agent and not a fellow servant, inasmuch as the duty of providing a safe working place is that of the master.[13] Where an employe works with another employe he

Western Union Tel. Co. v. Burgess, 108 Fed. 26; Koneski v. Delaware &c. R. Co., 77 N. J. L. 645, 74 Atl. 516, 26 L. R. A. (N. S.) 644 n, 18 Ann. Cas. 931.

[12] Quebec Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. ed. 656; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. R. 914, 37 L. ed. 772; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; distinguishing the cases of Chicago, Mil. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. ed. 787; Railway Co. v. Calahan, 56 Fed. 988; Garrahy v. Kansas City &c. R. Co., 25 Fed. 258; Ragsdale v. Northern Pac. R. Co., 42 Fed. 383; Mase v. Northern Pac. R. Co., 57 Fed. 283; Railroad Co. v. Andrews, 50 Fed. 728, 17 L. R. A. 190; St. Louis &c. R. Co. v. Needham, 63 Fed. 107, 25 L. R. A. 833, citing Naylor v. Railroad Co., 33 Fed. 801; Chicago R. Co. v. Henry, 7 Bradw. (Ill. App.) 322; Railway Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Slattery v. Toledo &c. R. Co., 23 Ind. 81; Clarke v. Pennsylvania &c. R. Co., 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; Chicago &c. R. Co. v. Barker, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375; Gilman v. Eastern &c. R. Co., 10 Allen (Mass.) 233, 87 Am. Dec. 635; Walker v. Boston &c. R. Co., 128 Mass. 8; Roberts v. Chicago &c. R. Co., 33 Minn. 218, 22 N. W. 389; Ling v. St. Paul &c. R. Co., 50 Minn. 160, 52 N. W. 378; Harvey v. New York &c. R. Co., 88 N. Y. 481, 484; Miller v. Southern &c. R. Co., 20 Ore. 285, 26 Pac. 70, 43 Alb. L. J. 354. See also Shuster v. Philadelphia &c. R. Co., 6 Pen. (Del.) 4, 62 Atl. 689, 690, 4 L. R. A. (N. S.) 407n (citing text). But compare Coleman v. Wilmington &c. R. Co., 25 S. Car. 446, 60 Am. Rep. 516.

[13] Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. ed. 994; Louisville &c. R. Co. v. Graham, 124 Ind. 89, 24 N. E. 668; Hardy v. Chicago &c. R. Co., 149 Iowa 41, 127 N. W. 1093; Hannibal &c. R. Co. v. Fox, 31 Kans. 586, 3 Pac. 320; Roux v. Blodgett &c. Co., 94 Mich. 607, 54 N. W. 492; Dayharsh v. Hannibal &c. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. 900; Bradley v. Chicago &c. R. Co., 138 Mo. 293, 39 S. W. 763; Zintek v. Stimson &c. Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; Flannegan v. Chesapeake &c. R. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. 896. But

has been held as to such work a fellow servant, although as to the duty of making the working place safe he may be a superior agent.[14] An employe charged with the duty of keeping machinery and appliances in repair usually acts in discharging such duty in the master's place, and is not a mere fellow servant.[15] It has been held that a trainmaster, in directing a car to be removed from a train, is a fellow servant of the brakeman of that train.[16] But the master owes a positive

see Bridges v. Los Angeles &c. R. Co., 156 Cal. 492, 105 Pac. 586, 25 L. R. A. (N. S.) 914; Gilmore v. Oxford &c. Co., 55 N. J. L. 39, 25 Atl. 707. See generally Palmer v. Michigan &c. R. Co., 93 Mich. 363, 53 N. W. 397, 17 L. R. A. 636, 32 Am. St. 507; Sadowski v. Michigan &c. R. Co., 84 Mich. 100, 47 N. W. 598; Galveston &c. R. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. 78; Vaillancourt v. Grand Trunk R. Co., 82 Vt. 416, 74 Atl. 99.

[14] Stockmeyer v. Reed, 55 Fed. 259, 47 Alb. L. J. 488; Lindvall v. Woods, 44 Fed. 855; Railway Co. v. Torry, 58 Ark. 217, 24 S. W. 244. See Telander v. Sunlin, 44 Fed. 564; Northern &c. R. Co. v. Petersen, 51 Fed. 182, 32 Am. Law Reg. 340; Casey v. Kelly &c. Co., 240 Ill. 416, 88 N. E. 982; Louisville &c. R. Co. v. Graham, 124 Ind. 89, 24 N. E. 668; Nall v. Louisville &c. R. Co., 129 Ind. 260, 28 N. E. 611, 48 Am. & Eng. R. Cas. 309; Babcock v. Old Colony R. Co., 150 Mass. 467, 23 N. E. 325; Malcolm v. Fuller, 152 Mass. 160, 25 N. E. 83; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. 787, 3 L. R. A. 559; Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905; McGinley v. Levering, 152 Pa. St. 366, 25 Atl. 824; Kliegel v. Wiesel, 84 Wis. 148, 53 N. W. 1119; Stutz v. Armour, 84 Wis. 623, 54 N. W. 1000. See also next following section and authorities cited.

[15] Fox v. Spring Lake &c. Co., 89 Mich. 387, 50 N. W. 872. See also Tabor v. St. Louis &c. R. Co., 210 Mo. 385, 109 S. W. 764, 124 Am. St. 728.

[16] Martin v. Chicago &c. R. Co., 65 Fed. 384. This, however, may be questionable. See Lupher v. Atchison &c. R. Co., 86 Kans. 712, 122 Pac. 106, Ann. Cas. 1913C, 498 n; Chicago &c. R. Co. v. Birk, 44 Tex. Civ. App. 615, 99 S. W. 753; Lincoln v. Central Vermont R. Co., 82 Vt. 187, 72 Atl. 821, 137 Am. St. 998. But it has been held erroneously, as we think, that a section man in placing cars upon a side-track is not a fellow-servant of the trainmen. See Northern &c. R. Co. v. Hogan, 63 Fed. 102; Parker v. New York &c. R. Co., 18 R. I. 773, 30 Atl. 849; Clay v. Chicago &c. R. Co., 56 Ill. App. 235. If, however, the employe is charged with the master's duty of furnishing and selecting safe cars or appliances, he is in effect a vice-principal as to such matter. Chicago Union Trac. Co. v. Sawusch, 218 Ill. 130, 75 N. E. 797, 1 L. R.

duty to his employes not only to use reasonable care to provide and keep a reasonably safe place to work, but also to provide and keep in repair reasonably safe tools and appliances, and to employ reasonably competent men, and these are positive duties that cannot be delegated by the master so as to relieve him from responsibility.[17] And there are other duties of a similar nature, such, for instance, in many jurisdictions, at least, as the duty to promulgate rules where the business requires it, and to warn inexperienced employes, or even experienced employes, in certain instances, or the like, to which the same rule applies.[18]

§ 1898 (1318a). Vice-principal—The true test.—Something may be said in favor of each and all of the tests suggested by the different courts in various cases, when properly limited and applied. But it seems to us that tests other than the nature of the duty and character of the act are subordinate, rather than ultimate tests, and that, while sometimes helpful, they have been the cause of much confusion and some error in the decisions. The most satisfactory test, in our opinion, as already

A. (N. S.) 670; Missouri &c. R. Co. v. Wilhoit, 6 Ind. Terr. 534, 98 S. W. 341; Ward v. Louisville &c. R. Co., 23 Ky. L. 1326, 65 S. W. 2. See also Griffin v. Boston &c. R. Co., 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. 526; Pennsylvania R. Co. v. La Rue, 81 Fed. 148.

[17] Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. ed. 994; Erie R. Co. v. Schomer, 171 Fed. 798; Harrison v. Detroit &c. R. Co., 79 Mich. 409, 44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. 180; Mercer v. Atlantic &c. R. Co., 154 N. Car. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002n; Perez v. Union Pac. R. Co. (Utah), 173 Pac. 236; Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359 and note, 64 Am. St. 791; Flannegan v. Chesapeake &c. R. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. 896.

[18] See Messinger v. New York &c. R. Co., 85 Conn. 467, 83 Atl. 631; McDuffie v. Ocean S. S. Co., 5 Ga. App. 125, 62 S. E. 1008; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Chicago &c. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. 259; Ashcraft v. Davenport Locomotive Works, 148 Iowa 420, 126 N. W. 1111; Bushby v. New York &c. R. Co., 107 N. Y. 374, 1 Am. St. 844; Miller v. Southern Pac. Co., 20 Ore. 285, 26 Pac. 70; Chapman v. Southern Pac. Co., 12 Utah 30, 41 Pac. 551; Richmond &c. R. Co. v. Burnett, 88 Va. 538,

intimated, is that of the character of the act, or, in other words, the nature of the duty and the capacity in which the alleged negligent employe is acting at the time. This doctrine, as at present understood and applied, is of comparatively recent date, but it seems to be steadily gaining ground, and, although there is some difference of opinion as to its proper application in particular cases, it is approved as the most satisfactory general test, both by a majority of the courts and by most of the recent writers upon the subject.[19]

§ 1899 (1319). Vice-principal as to particular subjects.—There are well-reasoned cases which hold, correctly, as we think, that an employe may be a fellow servant as to some duties and a

14 S. E. 372; Madden v. Chesapeake &c. R. Co., 28 W. Va. 610, 57 Am. St. 695; Daniel v. Chesapeake &c. R. Co., 36 W. Va. 397, 15 S. E. 162, 16 L. R. A. 383, 32 Am. St. 870, and numerous authorities cited and reviewed in the note in 75 Am. St. 591-606. For a review of numerous cases as to what is not a positive duty of the master, see the opinion in American Bridge Co. v. Seeds, 144 Fed. 605.

[19] It is approved by Judge Thompson, in 4 Thomp. Neg. §§ 4918, 4923, 4924, 4939, by Mr. Freeman in an elaborate note in 75 Am. St. 584, et seq. See also note in 20 L. R. A. (N. S.) 434; note in 52 L. R. A. (N. S.) 1082, and ante. §§ 1895, 1896, and in addition to authorities there cited. See also Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359 and note, 64 Am. St. 791; Consolidated Interstate &c. Mining Co. v. Witouski, 249 Fed. 833; Alabama Gt. So. R. Co. v. Vail, 38 Ala. 124, 38 So. 124; Colorado &c. R. Co. v. Naylen, 17 Colo. 501, 30 Pac. 249, 31 Am. St. 335; Chicago &c. R. Co. v. Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. 396; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65, 67; New Pittsburg &c. Co. v. Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; Robertson v. Chicago &c. R. Co., 146 Ind. 486, 45 N. E. 655; Kerner v. Baltimore &c. R. Co., 149 Ind. 21, 24, 48 N. E. 364; Newbury v. Getchel &c. Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. 582; Harrison v. Detroit &c. R. Co., 79 Mich. 409, 44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. 180; Schroeder v. Flint &c. R. Co., 103 Mich. 213, 61 N. W. 663, 29 L. R. A. 321, 50 Am. St. 354; O'Neil v. Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532; Ricker v. Central R. Co., 73 N. J. L. 751, 64 Atl. 1068, 7 L. R. A. (N. S.) 650 n, 9 Ann. Cas. 785; Hankins v. New York &c. R. Co., 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. 616; Neagle v. Syracuse &c. R. Co., 185 N. Y. 270, 77 N. E. 1064; Davis v. Central Vt. R. Co., 55 Vt. 84, 45 Am. St. 590.

vice-principal as to others.[20] In several of the cases it has been held that the foreman of a gang of section hands, with authority to employ and discharge men, although a vice-principal as to that duty, is a fellow servant with the section men in doing work on the track.[21] The question as to what duties the employe is a fellow servant and as to what duties he is a superior agent is to be determined by ascertaining to what extent he acts in the master's place, for to that extent and no further he is, according to what seems to us the better opinion, to be regarded as a superior agent.

§ 1900 (1320). **What constitutes a common employment.** — The modern decisions do not recognize the rule of the earlier English and American cases upon the question of what constitutes a common employment, but, while there can be no doubt that there is a change in the current of decisions there is very great doubt as to what the law is. The federal decisions

[20] Quinn v. New Jersey &c. Co., 23 Fed. 363; Borgman v. Omaha &c. R. Co., 41 Fed. 667; Reed v. Stockmeyer, 74 Fed. 186; Holtz v. Great Northern R. Co., 69 Minn. 524, 72 N. W. 805; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Brick v. Rochester &c. R. Co., 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559 and note, 8 Am. St. 787; Brunell v. Southern Pac. Co., 34 Ore. 256, 259, 56 Pac. 129; Gann v. Nashville &c. R. Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. 687; Criswell v. Railway Co., 30 W. Va. 798, 6 S. E. 31. See also Illinois &c. R. Co. v. Marshall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; Metropolitan &c. R. Co. v. Skola, 183 Ill. 454, 56 N. E. 171, 75 Am. St. 120; Gale v. Helmbacher &c. Rolling Mill Co., 159 Mo. App. 639, 140 S. W. 77; Klockinski v. Shores Lumber Co., 93 Wis. 417, 67 N. W. 934; Morelli v. Twohy Bros. Co., 54 Mont. 366, 170 Pac. 757; Union Pac. R. Co. v. Marone, 246 Fed. 916. But compare Purcell v. Southern R. Co., 119 N. Car. 728, 26 S. E. 161; Hutson v. Missouri Pac. R. Co., 50 Mo. App. 300; Sweeney v. Gulf &c. R. Co., 84 Tex. 433, 19 S. W. 555, 31 Am. St. 71.

[21] Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Kerner v. Baltimore &c. R. Co., 149 Ind. 21, 48 N. E. 364; Louisville &c. R. Co. v. Isom, 10 Ind. App. 691, 38 N. E. 423. See also Klockinski v. Shores Lumber Co., 93 Wis. 417, 67 N. W. 934. See Hardy v. Minneapolis &c. R. Co., 36 Fed. 657; Milherck v. E. Jenckes Mfg. Co., 24 R. I. 131, 52 Atl. 687; White's Supp. to Thomp. Neg. §§ 4939, 4958.

are in conflict and the state courts have taken widely different views of the question. The cases agree that, in order to constitute a common employment, there must be a common master, and the servants must be engaged in the same general line of service,[22] but as to what is the same general line of service there is very great conflict. Some of the courts affirm the department theory, others the consociation doctrine, while others deny both the department and consociation theories. We shall not attempt to analyze the cases nor to comment upon them, but in treating of the different classes of railroad employes we shall refer to cases which illustrate the different lines of decision.[23] It has been held that the porter in the service of a palace car company is not the fellow servant of the trainmen of the train to which the palace car is attached, but is a passenger.[24] We think, however, that the case referred to in some

[22] Hardy v. Delaware &c. R. Co., 57 N. J. L. 505, 31 Atl. 281. See also Pittsburg &c. R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128; United States Board & Paper Co. v. Landers (Ind. App.), 92 N. E. 203; Kelly v. Union Pac. R. Co., 141 Mo. App. 490, 125 S. W. 818; Baker v. Philadelphia &c. R. Co., 149 Fed. 882, 884.

[23] See notes in 51 L. R. A. 513, et seq.; 54 L. R. A. 33, et seq.; 75 Am. St. 580, 584, et seq.; 52 L. R. A. (N. S.) 1082, et seq.

[24] Jones v. St. Louis &c. R. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. 514, citing Mound City &c. Co. v. Conlon, 92 Mo. 221, 4 S. W. 922; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Brown v. Smith, 86 Ga. 274, 12 S. E. 411, 33 N. E. 381; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Thorpe v. New York &c. R. Co., 76 N. Y. 402, 32 Am. Rep. 325; Dwinelle v. New York &c. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; Wyllie v. Palmer, 137 N. Y. 248, 19 L. R. A. 285; Railway Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Louisville &c. R. Co. v. Katzenberger, 16 Lea (Tenn.) 380, 57 Am. Rep. 232; Rourke v. White Moss &c. Co., L. R. 1 C. P. Div. 556. The court cited the cases of Mellor v. Missouri &c. R. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Graham v. Pacific R. Co., 66 Mo. 536; Tibby v. Missouri &c. R. Co., 82 Mo. 292; Carroll v. Missouri &c. R. Co., 88 Mo. 239, 57 Am. Rep. 382, and held that under the doctrine of those cases the porter was a passenger. Under ordinary arrangements, where the porter is employed and controlled by the sleeping car company and is not the servant of the railroad company, it is probably true that he is not a fellow-servant of the railroad men, but neither is he a passenger of the railroad company. McDermon v. Southern Pac. Co., 122 Fed. 669; Chicago &c.

respects goes entirely too far. It has also been held that a porter of a sleeping-car is not the fellow-servant of the employes of a railroad company engaged in operating a different train from the one to which the sleeping-car was attached.[25] A porter of a railroad train, although employed by the railroad company, and the engineer have been held not to be fellow servants,[26] but it seems to us that this doctrine is unsound, for in such a case there is a common service in all that the term implies, and the case is not that of servant of different masters, nor is the duty of either the engineer or of the porter that of the master. Persons cannot well be fellow servants, however, unless they have a common master,[27] and employes of one company are not fellow servants of the employes of another

R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 106 Am. St. 187. See also Russell v. Pittsburg &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; and compare Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560.

[25] Hughson v. Richmond &c. R. Co., 2 App. (D. C.) 98. See Union &c. R. Co. v. Kelly, 4 Colo. App. 325, 35 Pac. 923.

[26] Cincinnati &c. R. Co. v. Palmer, 98 Ky. 382, 33 S. W. 199. It seems to us that the case cited carries even the erroneous "doctrine of subordination" much too far.

[27] Gray v. Philadelphia &c. R. Co., 24 Fed. 168; Baker v. Philadelphia &c. R. Co., 149 Fed. 882; Chicago &c. R. Co. v. Raidy, 203 Ill. 310, 67 N. E. 783; Ford v. Coal Belt R. Co., 143 Ill. App. 431; Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Wagner v. Boston &c. R. Co., 188 Mass. 437, 74 N. E. 919; Carroll v. Minnesota &c. R. Co., 13 Minn. 30, 97 Am. Dec. 221; Kelly v. Tyra, 103 Minn. 176, 114 N. W. 750, 115 N. W. 636, 17 L. R. A. (N. S.) 334 n; Floody v. Chicago &c. R. Co., 109 Minn. 228, 123 N. W. 815, 134 Am. St. 77, 18 Ann. Cas. 274; Noonan v. New York Cent. &c. R. Co., 62 Hun 618, 16 N. Y. S. 678, affirmed in 131 N. Y. 594, 30 N. E. 67; Sullivan v. Tioga &c. R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. 793; Vannatta v. Central R. Co., 154 Pa. St. 262, 26 Atl. 384, 35 Am. St. 823; Noll v. Philadelphia &c. R. Co., 163 Pa. St. 504, 30 Atl. 157; Louisville &c. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418; Texas &c. R. Co. v. Easton, 2 Tex. Civ. App. 378, 21 S. W. 575; Gulf &c. R. Co. v. Gaskill, 103 Tex. 441, 129 S. W. 345; Swanson v. Northeastern R. Co., 3 Exch. Div. 341. A railway gate tender required to assist in unloading express matter does not become a servant of the express company so as to prevent recovery for the express messenger's negligence. Cannon v. Fargo, 222 N. Y. 321, 118 N. E. 796.

merely because one company operates its cars over the track of the other.[28]

§ 1901 (1321). **General managers—Superintendents.**—Where general charge and control of the operation of a railroad is given to a general manager or general superintendent such an agent or officer is a vice-principal.[29] The doctrine that the company is liable only in cases where the board of directors

[28] Chicago Terminal &c. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990; Robertson v. Boston &c. R. Co., 160 Mass. 191, 35 N. E. 775; Baker v. Philadelphia &c. Ry. Co., 149 Fed. 882; Martin v. Louisville &c. R. Co., 95 Ky. 612, 26 S. W. 801; Philadelphia &c. R. Co. v. State, 58 Md. 372. See also Jackson v. Detroit &c. R. Co., 161 Mich. 163, 125 N. W. 763. But compare Clark v. Chicago &c. R. Co., 92 Ill. 43; Stever v. Ann Arbor R. Co., 160 Mich. 207, 125 N. W. 47, 136 Am. St. 433, 52 L. R. A. (N. S.) 1139; Jackson v. Wheeling Terminal R. Co., 65 W. Va. 415, 64 S. E. 450; Stetler v. Chicago &c. R. Co., 46 Wis. 497, 1 N. W. 112.

[29] Wilson v. Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Gerrish v. New Haven Ice Co., 63 Conn. 9, 27 Atl. 235; Krogg v. Atlanta &c. R. Co., 77 Ga. 202, 4 Am. St. 79; Savannah &c. R. Co. v. Goss, 80 Ga. 524, 5 S. E. 777; Chicago &c. Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Indiana Car Co. v. Parker, 100 Ind. 181; Hoover Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; Hardy v. Chicago &c. R. Co., 149 Iowa 41, 127 N. W. 1093; Lasky v. Canadian &c. R. Co., 83 Maine 461, 22 Atl. 367; Cumberland &c. R. Co. v. State, 44 Md. 283; Shumway v. Walworth &c. Co., 98 Mich. 411, 57 N. W. 251; Schroeder v. Flint &c. R. Co., 103 Mich. 213, 61 N. W. 663, 29 L. R. A. 321, 50 Am. St. 354; Stephens v. Hannibal &c. R. Co., 86 Mo. 221; Hughlett v. Ozark &c. Co., 53 Mo. App. 87; Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Frazier v. Pennsylvania &c. R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; McGuire v. Lehigh Valley R. Co., 215 Pa. St. 618, 64 Atl. 825, 7 Ann. Cas. 613; Pennsylvania &c. R. Co. v. Mason, 109 Pa. St. 296, 58 Am. Rep. 722; Gunter v. Graniteville Manufacturing Co., 18 S. Car. 262, 44 Am. Rep. 573; Washburn v. Nashville &c. R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Galveston &c. R. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. 78; Phillips v. Chicago &c. R. Co., 64 Wis. 475, 25 N. W. 544, 23 Am. & Eng. R. Cas. 453; note in 51 L. R. A. 556, 559, et seq.; 4 Thomp. Neg. §§ 4946, 4951. See generally Kain v. Smith, 89 N. Y. 375; What Cheer Coal Co. v. Johnson, 56 Fed. 810; Cheeney v. Ocean Steamship Co., 95 Ga. 381, 19 S. E. 33; Quinn v. New Jersey &c. Co., 23 Fed. 363. The decision in Mobile &c. R. Co. v. Smith, 59 Ala. 245, seems to deny the doctrine

is guilty of negligence is not supported by the modern authorities. A subordinate manager or superintendent may or may not be a vice-principal, for, whether he is or not, depends upon whether duties resting upon the employer have been entrusted to him.[30]

§ 1902 (1322). Train dispatcher.—As is true of very many phases of the law of master and servant there is conflict upon the question whether a train dispatcher is the fellow servant of employes engaged in operating the trains of the company, but by no means so great as upon other phases of the law of master and servant. The decided weight of authority is that a train dispatcher is not a fellow servant,[31] but there is some

stated in the text, but so far as it can be regarded as doing so it is in conflict with the decision in Krogg v. Atlanta &c. R. Co., 77 Ga. 202, 4 Am. St. 79. See also Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252. The old English rule is strikingly illustrated by the case of Conway v. Belfast &c. R. Co., 11 Ir. R. C. L. 345.

[30] Ellington v. Beaver &c. Co., 93 Ga. 53, 19 S. E. 21; Rogers &c. Co. v. Hand, 21 Vroom (N. J.) 464; Beilfus v. New York &c. R. Co., 29 Hun (N. Y.) 556; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Malone v. Hathaway, 64 N. Y. 38; Webber v. Piper, 109 N. Y. 496, 16 N. E. 358; Texas &c. R. Co. v. Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333. See generally Shuster v. Philadelphia &c. R. Co., 6 Pen. (Del.) 4, 62 Atl. 689, 4 L. R. A. (N. S.) 407 n; Taylor v. Evansville &c. R. Co., 121 Ind. 124, 22 N. E. 876, 6 L. R. A. 584; Baldwin v. St. Louis &c. R. Co., 75 Iowa 297, 39 N. W. 507, 9 Am. St. 479; Hathaway v. Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651; Lupher v. Atchison &c. R. Co., 86 Kans. 712, 122 Pac. 106, Ann. Cas. 1913C, 498 n; McAndrews v. Burns, 39 N. J. L. 117; Mast v. Kern, 34 Ore. 247, 34 Pac. 950, 75 Am. St. 580. That is, the liability of the master generally depends, as already shown, upon the character of the act causing the injury and not merely upon the grade or rank of the negligent employe. See also 4 Thomp. Neg. § 4963.

[31] Cincinnati &c. R. Co. v. Clark, 57 Fed. 125; Baltimore &c. R. Co. v. Camp, 65 Fed. 952; Santa Fe & R. Co. v. Holmes, 136 Fed. 66, affirmed in 202 U. S. 438, 26 Sup. Ct. 676, 50 L. ed. 1094; Royce v. Delaware &c. R. Co., 180 Fed. 879; Sandidge v. Atchison &c. R. Co., 193 Fed. 867; Little Rock &c. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; McKune v. California &c. R. Co., 66 Cal. 302, 5 Pac. 482; Darrigan v. New York &c. R. Co., 52 Conn. 285, 52 Am. Rep. 590; Chicago &c. R. Co. v. McLallen, 84 Ill. 109; Chicago &c. R. Co. v. Young, 26 Ill. App. 115; Louisville &c. R. Co. v. Heck, 151

authority upon the opposite side of the question.[32] It seems to us that where the matter of moving trains and giving orders is entrusted to a train dispatcher generally he should be regarded as a superior agent, and not as a mere fellow servant, but that, as to a signal man, telegraph operator, or the like, whose duties concern mere details in the operation of a railroad, the rule is different.[33] The general duty of providing for the movement of trains may, as we believe, be justly regarded as the duty of the employer, while matters of detail, such as giving signals, telegraphing orders, and the like, cannot be so considered. It is

Ind. 292, 50 N. E. 988; Missouri &c. R. Co. v. Elliott, 2 Ind. Ter. 407, 51 S. W. 1067; Hannibal &c. R. Co. v. Kanaley, 39 Kans. 1, 17 Pac. 324; McLeod v. Ginther, 80 Ky. 399; Lasky v. Canadian &c. R. Co., 83 Maine 461, 22 Atl. 367; Hunn v. Michigan &c. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; Smith v. Wabash &c. R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. 720; Wallace v. Boston &c. R. Co., 72 N. H. 504, 57 Atl. 913; Ricker v. Central R. Co., 73 N. J. L. 751, 64 Atl. 1068, 7 L. R. A. (N. S.) 650 n, 9 Ann. Cas. 785; Sheehan v. New York &c. R. Co., 91 N. Y. 332; Dana v. New York &c. R. Co., 92 N. Y. 639; Hankins v. New York &c. R. Co., 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. 616; McChesney v. Panama R. Co., 49 N. Y. S. R. 148; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. 631; Haynes v. East Tennessee &c. R. Co., 3 Coldw. (Tenn.) 222; Washburn v. Nashville &c. R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Galveston &c. R. Co. v. Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; Galveston &c. R. Co. v. Fitzpatrick (Tex. Civ. App.), 83 S. W. 406; Phillips v. Chicago &c. R. Co., 64 Wis. 475, 23 Am. & Eng. R. Cas. 453.

[32] Norfolk &c. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. 392; Robertson v. Terre Haute &c. R. Co., 78 Ind. 77, 41 Am. Rep. 552 (overruled in 151 Ind. 292, 309, cited in last preceding note); Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Millsaps v. Louisville &c. R. Co., 69 Miss. 423, 13 So. 696. See Blessing v. St. Louis &c. R. Co., 77 Mo. 410; Rose v. Boston &c. R. Co., 58 N. Y. 217. Notice to the train dispatcher of the incompetency of a station agent and telegraph operator has been held not to be notice to the company. Reiser v. Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. 620. As to the officers to whom notice of the incompetency of servants may be effectively given, see Missouri &c. R. Co. v. Patton (Tex. Civ. App.), 25 S. W. 339; McDermott v. Hannibal &c. R. Co., 87 Mo. 285; Sutton v. New York &c. R. Co., 50 N. Y. S. R. 514; Davis v. Detroit &c. R. Co., 20 Mich. 105, 4 Am. Rep. 364.

[33] Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006, and see post, § 1909.

not to be expected, as is quite well agreed, that the master will act in matters of detail connected with the operation of the road, but as to the general movement of trains it is otherwise.

§ 1903 (1323). Master mechanic.—Where a railroad company entrusts to a master mechanic the duty of providing and keeping in safe condition for use the machinery and appliances with which employes are required to work the company is liable to an employe who, without contributory fault, and while acting within the scope of his duties, is injured by the negligence of the master mechanic in that regard. There is conflict upon this question, and the older authorities are opposed to the doctrine we have stated,[34] but it is fully sustained by the modern cases.[35] The rule does not rest upon the doctrine of subordination, but upon the principle that it is the master's duty to provide safe

[34] Columbus &c. R. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615 and note; Hard v. Vermont &c. R. Co., 32 Vt. 473. But see, contra, Davis v. Central &c. R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

[35] Hough v. Texas &c. R. Co., 100 U. S. 213, 25 L. ed. 612; St. Louis &c. R. Co. v. Harper, 44 Ark. 524; Krueger v. Louisville &c. R. Co., 111 Ind. 51, 11 N. E. 957, 31 Am. & Eng. R. Cas. 329; Ford v. Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598; Gottlieb v. New York &c. R. Co., 100 N. Y. 462, 3 N. E. 344, 24 Am. & Eng. R. Cas. 421; Douglas v. Texas &c. R. Co., 63 Tex. 564; Cooper v. Pittsburg &c. R. Co., 24 W. Va. 37. See Ballard v. Hitchcock &c. Co., 71 Hun 582, 24 N. Y. S. 1101; Taylor v. Evansville &c. R. Co., 121 Ind. 124, 22 N. E. 876, 6 L. R. A. 584 and notes, 16 Am. St. 372; Atchison &c. R. Co. v. Sledge, 68 Kans. 321, 74 Pac. 1111; Tabler v. Hannibal &c. R. Co., 93 Mo. 79, 5 S. W. 810; Hughlett v. Ozark &c. Co., 53 Mo. App. 87; Missouri Pac. R. Co. v. Sasse (Tex. Civ. App.), 22 S. W. 187; Cooper v. Pittsburg &c. R. Co., 24 W. Va. 37. But see Kidwell v. Houston &c. R. Co., 3 Woods (U. S.) 313, where it is held that notice to a master mechanic of the incompetency of employes is not notice to the company unless it is shown that the master mechanic had authority to hire and discharge such employes. We suppose, however, that if the employes are in the line of service over which the master mechanic has control that notice to him would be notice to the company, but if the employes were in some other line of service a different rule would apply. See also What Cheer &c. Co. v. Johnson, 56 Fed. 810. Contra, Ohio &c. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

machinery and appliances, and in performing that duty the master mechanic occupies the master's place. The question whether a master mechanic is a superior agent or a fellow servant is not determined from the name or title, but from the duties entrusted to him. As in other cases where the question is as to the nature and scope of an employe's authority, the party who affirms that he is a superior agent must prove, as a fact, that the master mechanic was entrusted with the performance of a duty imposed by law upon the employer, for it is only as to such a duty that he can be regarded as a vice-principal.

§ 1904 (1324). Road masters.—Where a road master is placed in charge of the roadbed or track he is in relation to that duty a vice-principal.[36] It has been held that where a train is in charge of a roadmaster the trainmen and laborers and sectionmen are all fellow servants.[37] It seems to us that such employes as those just named would be fellow servants, although the train was not under the charge of the road master.[38] In another case it was held that a road master was a fellow servant

[36] Harrison v. Detroit &c. R. Co., 79 Mich. 409, 44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. 180, 41 Am. & Eng. R. Cas. 398; Atchison &c. R. Co. v. Moore, 31 Kans. 197, 1 Pac. 644; Lupher v. Atchison &c. R. Co., 86 Kans. 712, 122 Pac. 106, Ann. Cas. 1913C, 498 n; Hoke v. St. Louis &c. R. Co., 88 Mo. 360; Chicago &c. R. Co. v. Birk, 44 Tex. Civ. App. 615, 99 S. W. 753. See St. Louis &c. R. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; Kansas City &c. R. Co. v. Kier, 41 Kans. 661, 21 Pac. 770, 13 Am. St. 311; Browning v. Wabash &c. R. Co., 124 Mo. 55, 27 S. W. 644; Palmer v. Michigan &c. R. Co., 93 Mich. 363, 53 N. W. 397, 17 L. R. A. 636, 32 Am. St. 507. But compare Walker v. Boston &c. R. Co., 128 Mass. 8; Brown v. Winona &c. R. Co., 27 Minn. 162, 6 N. W. 484, 38 Am. Rep. 285; New Orleans &c. R. Co. v. Hughes, 49 Miss. 258; Galveston &c. R. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. 78.

[37] Northern Pac. R. Co. v. Smith, 59 Fed. 993.

[38] Zikos v. Oregon &c. R. Co., 179 Fed. 893; Evansville &c. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Vandalia R. Co. v. Parker, 178 Ind. 138, 98 N. E. 705; Wickham v. Detroit United Ry., 160 Mich. 277, 125 N. W. 22, 52 L. R. A. (N. S.) 1082, Ann. Cas. 1913E, 1069 n, and note; Hoover v. Beech Creek &c. R. Co., 154 Pa. St. 362, 26 Atl. 315; Carney v. Caraquet R. Co., 29 N. B. 425.

with the trainmen of the train on which he was riding in such a sense as to preclude him from recovering for injuries caused by the negligence of the trainmen.[39]

§ 1905 (1325). Train masters.—Where the employer entrusts to a train master the general duty of making up and moving trains, the train master is, according to what seems to us the better opinion, so far as that duty is concerned, a vice-principal.[40] The test as to the position of such employes as trainmasters is the same as that in other cases where employes are serving a common master in a common employment. That is supplied by the answer to the question, were they entrusted with any of the duties imposed by law upon the employer?

§ 1906 (1326). Station masters.—Where a station agent is entrusted with duties imposed by law upon the master, then, so far as those specific duties are concerned, there is reason for regarding him as a vice-principal, but unless he is entrusted with such duties he is, as we believe, a fellow servant of section-men, trainmen, and all employes engaged in the common service of loading, switching, running trains, and the like. Whether the station agent or station master is entrusted with the duties resting on the employer is ordinarily a question of fact, and it must, as we think, be shown that he was entrusted with the performance of such duties by a party who seeks to establish the relation of vice-principal. The courts generally hold that a station agent or station master is not ordinarily a vice-prin-

[39] Gulf &c. R. Co. v. Ryan, 69 Tex. 665, 7 S. W. 83. See also Galveston &c. R. Co. v. Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. 78.

[40] Goodman v. Delaware &c. R. Co., 167 Pa. St. 332, 31 Atl. 670; International &c. R. Co. v. Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. 795. See also Metropolitan West Side Elevated R. Co. v. Skola, 183 Ill. 454, 56 N. E. 171, 75 Am. St. 120; Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883; Jachetta v. San Pedro &c. R. Co., 36 Utah 470, 105 Pac. 100, 52 L. R. A. (N. S.) 1106 n. But see where he is not engaged in such duty but operating the car himself. Indiana Union Trac. Co. v. Pring, 41 Ind. App. 247, 83 N. E. 733, with which compare, however, Morrison v. San Pedro &c. R. Co., 32 Utah 85, 88 Pac. 998, 125 Am. St. 828.

cipal.[41] Trainmen are held to be fellow servants with employes whose duty it is to take the number of the cars or the like,[42] and we can see no reason why the same rule should not apply to station agents.

§ 1907 (1326a). Yard masters.—A yard master is ordinarily a fellow servant of those working in the yard.[43] He is not usually a vice-principal. There are, however, some decisions that treat him as such, and if he is entrusted with a positive duty which the master owes to his employes his negligence in regard to such a non-delegable duty may render the master liable under the rule already stated.[44] The conflict of opinion

[41] Hodgkins v. Eastern R. Co., 119 Mass. 419; Miller v. Michigan &c. R. Co., 123 Mich. 374, 82 N. W. 58; Henry v. Ann Arbor R. Co., 140 Mich. 446, 103 N. W. 846; Graham v. Detroit &c. R. Co., 151 Mich. 629, 115 N. W. 993, 25 L. R. A. (N. S.) 326; Brown v. Minneapolis &c. R. Co., 31 Minn. 553, 18 N. W. 834, 15 Am. & Eng. R. Cas. 333; Evans v. Atlantic &c. R. Co., 62 Mo. 49; Byrnes v. New York &c. R. Co., 113 N. Y. 251, 21 N. E. 50, 4 L. R. A. 151; Hallock v. New York &c. R. Co., 197 N. Y. 450, 90 N. E. 1124 (station agent and brakeman of train switching at station are fellow-servants); Dealey v. Philadelphia &c. R. Co., 2 Sad. (Pa.) 224, 4 Atl. 170; Gaffney v. New York &c. R. Co., 15 R. I. 456, 7 Atl. 284, 31 Am. & Eng. R. Cas. 265; Galveston &c. R. Co. v. Farmer, 73 Tex. 85, 11 S. W. 156; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151; Toner v. Chicago &c. R. Co., 69 Wis. 188, 33 N. W. 433. See Palmer v. Utah &c. R. Co., 2 Idaho 350, 13 Pac. 425; Brown v. Winona &c. R. Co., 27 Minn. 162, 38 Am. Rep. 285. But that he is not always a fellow-servant, see Atchison &c. R. Co. v. Seeley, 54 Kans. 21, 37 Pac. 104; Louisville &c. R. Co. v. Grassman, 147 Ky. 618, 144 S. W. 748; Louisville &c. R. Co. v. Jackson, 106 Tenn. 438, 61 S. W. 771; St. Louis &c. R. Co. v. Biggs, 53 Ill. App. 550.

[42] New York &c. R. Co. v. Hyde, 56 Fed. 188; Beuhring v. Chesapeake &c. R. Co., 37 W. Va. 502, 16 S. E. 435.

[43] Thomas v. Cincinnati &c. R. Co., 97 Fed. 245; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623, 50 L. R. A. 47; Moody v. Hamilton &c. Co., 159 Mass. 70, 34 N. E. 185; Farquhar v. Alabama &c. R. Co., 78 Miss. 193, 28 So. 850; Besel v. New York &c. R. Co., 70 N. Y. 171; McCosker v. Long Island R. Co., 84 N. Y. 77; Kirk v. Atlanta &c. R. Co., 94 N. Car. 625, 55 Am. Rep. 621; Southern R. Co. v. Smith, 107 Va. 553, 59 S. E. 372. See also Parker v. New York &c. R. Co., 18 R. I. 773, 30 Atl. 849.

[44] Lyttle v. Chicago &c. R. Co., 84 Mich. 289, 47 N. W. 571; Taylor v. Missouri Pac. R. Co. (Mo.), 16

is generally as to whether the act in question is of such a character, although there are a few jurisdictions in which the question may be made to turn upon the superior servant doctrine.

§ 1908 (1327). **Inspectors.**—There is a conflict upon the question whether inspectors are to be regarded as fellow servants. The great weight of authority is that they are not fellow servants, but superior agents.[45] There are, however, many cases

S. W. 206; Louisville &c. R. Co. v. Davis, 91 Ala. 487, 8 So. 552. See also Armstrong v. Oregon &c. R. Co., 8 Utah 420, 32 Pac. 693; St. Louis &c. R. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; Driscoll v. Chicago &c. R. Co., 97 Ill. App. 668; Howard v. Chesapeake &c. R. Co., 28 Ky. L. 891, 90 S. W. 950; Texas &c. R. Co. v. Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333; Daniel v. Chesapeake &c. R. Co., 36 W. Va. 397, 15 S. E. 162, 32 Am. St. 870.

[45] King v. Ohio &c. R. Co., 14 Fed. 277, 8 Am. & Eng. R. Cas. 119; Carpenter v. Mexican &c. R. Co., 39 Fed. 315; Little Rock &c. R. Co. v. Mosely, 56 Fed. 1009; Louisville &c. R. Co. v. Ward, 61 Fed. 927; Louisville &c. R. Co. v. Kelly, 63 Fed. 407; Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; Atchison &c. R. Co. v. Mulligan, 67 Fed. 569; Baltimore &c. R. Co. v. Root, 177 Fed. 200; Colorado &c. R. Co. v. Naylon, 17 Colo. 501, 30 Pac. 249, 31 Am. St. 335; Chicago &c. R. Co. v. Hoyt, 122 Ill. 369, 12 N. E. 225, 31 Am. & Eng. R. Cas. 309; Chicago &c. R. Co. v. Kneirim, 48 Ill. App. 243; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. 67; Indiana &c. R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Louisville &c. R. Co. v. Miller, 141 Ind. 533, 40 N. E. 116; Brann v. Chicago &c. R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243; Missouri &c. R. Co. v. Dwyer, 36 Kans. 58, 12 Pac. 352; Illinois &c. R. Co. v. Hilliard, 99 Ky. 684, 37 S. W. 75; McDonald v. Michigan Cent. R. Co., 132 Mich. 372, 93 N. W. 1041, 102 Am. St. 426; Fay v. Minneapolis &c. R. Co., 30 Minn. 231, 15 N. W. 241, 11 Am. & Eng. R. Cas. 193; Macy v. St. Paul &c. R. Co., 35 Minn. 200, 28 N. W. 249; Condon v. Missouri &c. R. Co., 78 Mo. 567, 17 Am. & Eng. R. Cas. 583; Coontz v. Missouri &c. R. Co., 121 Mo. 652, 26 S. W. 661; Browning v. Wabash &c. R. Co., 124 Mo. 55, 27 S. W. 644; Ballard v. Hitchcock &c. Co., 71 Hun 582, 24 N. Y. S. 1101; Cameron v. Great Northern R. Co., 8 N. Dak. 124, 128, 131, 77 N. W. 1016; Railway Co. v. Erick, 51 Ohio St. 146, 37 N. E. 128; St. Louis &c. R. Co. v. Putnam, 1 Tex. Civ. App. 142, 20 S. W. 1002; Daniels v. Union Pac. R. Co., 6 Utah 357, 23 Pac. 762 (affd. in 152 U. S. 684, 14 Sup. Ct. 756, 38 L. ed. 597). See also Kastl v. Wabash R. Co.,

holding that inspectors are fellow servants.[46] We think that inspectors are superior agents, for the reason that the duty of inspection is that of the master. Where the duty of inspection rests on the servant himself, or on fellow servants in some jurisdictions, it has been held that the rule that the master must inspect does not apply, and the inspector should be regarded as a fellow servant.[47]

§ 1909 (1328). Telegraph operators.—It is a matter of which judicial notice is taken that, in operating a railroad, the services of telegraph operators and signal men are required, and, as it seems to us, judicial notice must also extend to the fact that employes of the class named are ordinarily employed in matters

114 Mich. 43, 72 N. W. 28, and other cases to the same effect cited in note in 52 L. R. A. (N. S.) 1095, 1096, 1098.

[46] Smoot v. Mobile &c. R. Co., 67 Ala. 13; St. Louis &c. R. Co. v. Rice, 51 Ark. 457, 11 S. W. 699, 4 L. R. A. 173; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; Wonder v. Baltimore &c. R. Co., 32 Md. 411, 3 Am. Rep. 143; Mackin v. Boston &c. R. Co., 135 Mass. 201, 46 Am. Rep. 456, 15 Am. & Eng. R. Cas. 196; Whitmore v. Boston &c. R. Co., 150 Mass. 477, 23 N. E. 220; Smith v. Potter, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161, 2 Am. & Eng. R. Cas. 140; Dewey v. Detroit &c. R. Co., 97 Mich. 329, 52 N. W. 942, 22 L. R. A. 292, 37 Am. St. 348; Byrnes v. New York &c. R. Co., 113 N. Y. 251, 21 N. E. 50, 4 L. R. A. 151; Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Nashville &c. Co. v. Foster, 10 Lea (Tenn.) 351, 11 Am. & Eng. R. Cas. 180. The supreme court of Arkansas argues with much ability that there is a difference between a general inspector and car inspectors, but we think the argument, although plausible, is unsound. The duty of inspection being that of the master its delegation to an employe makes him a superior agent, for what the master must himself do can not be the act of a mere fellow-servant, nor can it make any difference that the duty relates only to particular appliances or particular place inasmuch as over all places and appliances requiring inspection the master's duty extends. There may, perhaps, be appliances which the master is not under a duty to inspect. McCampbell v. Cunard &c. Co., 144 N. Y. 552, 39 N. E. 637.

[47] Nord &c. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619. See, however, and compare Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. 67; Nord Deutscher &c. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. 604; Martin v. Wa-

of detail. The courts are by no means agreed upon the question whether telegraph operators are vice-principals or fellow servants. Many cases affirm that they are vice-principals,[48] while many others assert that they are not.[49] It is, we know, somewhat bold to venture an opinion upon a question upon which the authorities fight so stubbornly, but, nevertheless, we briefly state our views upon the question. It seems to us that telegraph operators are employes engaged in performing duties connected with the detail work of operating a railroad, and are not entrusted with the duties devolved by law upon the master, and that they are engaged under a common master in a common employment, that of moving trains upon the road. As well say that persons in charge of telephones over which directions are given in a large manufacturing establishment are vice-principals as that telegraph operators are vice-principals.

bash R. Co., 142 Fed. 650; George &c. Brewing Co. v. Wood, 27 Ky. L. 1012, 87 S. W. 772; San Pedro R. Co. v. Brown, 258 Fed. 806, 8 A. L. R. 865 and note.

[48] Illinois &c. R. Co. v. Hunter, 70 Miss. 471, 12 So. 482; East Tennessee &c. R. Co. v. DeArmond, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. 816; Hogan v. Missouri &c. R. Co., 88 Tex. 679, 32 S. W. 1035 (statute); Neesley v. Southern Pac. R. Co., 35 Utah 259, 99 Pac. 1067 (statute); Madden v. Chesapeake &c. R. Co., 28 W. Va. 610, 57 Am. Rep. 695; Haney v. Pittsburg &c. R. Co., 38 W. Va. 570, 18 S. E. 748; Flannegan v. Chesapeake &c. R. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. 896; Hall v. Galveston &c. R. Co., 39 Fed. 18; St. Louis &c. R. Co. v. Furry, 114 Fed. 898 (under Arkansas statute establishing department doctrine); Northern Pac. &c. R. Co. v. Charless, 51 Fed. 562. The case last cited is built principally upon the decision in the Ross case, and, as the Ross case has been practically overthrown, the cases following it can not carry weight as authority. We think that the court in the Charless case, supra, was in error in confusing telegraph operators with train dispatchers and erroneously applied the doctrine of Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. 631. Most of the other cases above cited are from jurisdictions in which the separate department doctrine has been adopted either under a statute or by the courts.

[49] Price v. Detroit G. H. & M. R. Co., 145 U. S. 651, 12 Sup. Ct. 986, 36 L. ed. 843 (by divided court); Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006 (four justices dissenting); McKaig v. Northern &c. R. Co., 42 Fed. 288; Cincinnati &c. R. Co. v. Clarke, 57 Fed. 125; Baltimore &c. R. Co. v. Camp, 65 Fed. 952; Oregon &c. R. Co. v. Frost, 74 Fed.

They cannot be regarded as vice-principals without violating the settled rule that the master's duty does not extend to the details of the work of the common employment, nor without violating the rule that he only is a vice-principal to whom a duty resting on the master is entrusted. There is no more reason for holding that the master's duty is to see that every telegraphic direction is correctly transmitted than there is for holding that the master must see that every verbal direction given by a switchman, conductor or brakeman regarding the opening or closing of a switch is correctly worded. Our conclusion is that where the master exercises ordinary care in selecting competent telegraph operators he is not liable to an employe injured by reason of their negligence. All the analogous cases support this conclusion, for with very rare exceptions it is held that matters of detail concerning the operation of a railroad pertain to the duties of employes and are not duties of the employer. A train dispatcher who has general charge of the movements of the trains occupies a different position from telegraph operators who assist in the details connected with the movements of trains. In some of the cases a distinction is made between signal-men or flagmen and telegraph operators, but we deferentially submit that there is no solid basis for the distinction.[50] It cannot be justly held that telegraph operators whose duty it is to transmit orders or give signals are superior agents, for they do not command, inasmuch as they simply transmit telegraphic orders, and in doing this no more discharge the master's duty than do ordinary signal-men or flagmen.

965; Illinois Cent. R. Co. v. Bentz, 99 Fed. 657; Rogers v. Pere Marquette R. Co., 166 Mich. 42, 131 N. W. 159, 52 L. R. A. (N. S.) 1123, Ann. Cas. 1912D, 881 n; Dana v. New York &c. R. Co., 23 Hun (N. Y.) 473; Monaghan v. New York &c. R. Co., 45 Hun (N. Y.) 113; Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515; House v. Lehigh Val. R. Co., 128 App. Div. 756, 113 N. Y. S. 155; Reiser v. Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 125, 34 Am. St. 620.

[50] Flannegan v. Chesapeake &c. R. Co., 38 W. Va. 570, 21 S. E. 1028; Haney v. Pittsburg &c. R. Co., 38 W. Va. 570, 18 S. E. 748.

§ 1910 (1329). **Foremen.**—There is hopeless conflict upon the question whether a foreman, with authority to hire and discharge employes, is, or is not, a fellow servant of those engaged in the same common employment.[51] We do not believe that the question is to be determined merely upon the theory that

[51] Affirming that he is not a fellow-servant: Chicago &c. R. Co. v. Lundstrum, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718, 21 Am. & Eng. R. Cas. 528; Borgman v. Omaha &c. R. Co., 41 Fed. 667; Woods v. Lindvall, 48 Fed. 62; Cleveland &c. R. Co. v. Brown, 56 Fed. 804; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037, 17 L. R. A. 602, 31 Am. St. 340; Mattise v. Consumers' &c. Co., 46 La. Ann. 1535, 16 So. 400, 49 Am. St. 356; Blomquist v. Chicago &c. R. Co., 60 Minn. 426, 62 N. W. 818; Berglund v. Illinois Cent. R. Co., 109 Minn. 317, 123 N. W. 928; Tendall v. Great Northern R. Co., 113 Minn. 473, 130 N. W. 22; Dayharsh v. Hannibal &c. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. 900; Sullivan v. Hannibal &c. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. 388; Russ v. Wabash &c. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; Higgins v. Missouri &c. R., 43 Mo. App. 547; Claybaugh v. Kansas City &c. R. Co., 56 Mo. App. 630; Sioux City &c. R. Co. v. Smith, 22 Nebr. 775, 36 N. W. 285; Carnahan v. Chicago &c. R. Co., 102 Nebr. 76, 165 N. W. 956; Logan v. North Carolina &c. R. Co., 116 N. Car. 940, 21 S. E. 959; Sweeney v. Gulf &c. R. Co., 84 Tex. 433, 19 S. W. 555, 31 Am. St. 71; Texas &c. R. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058; Anderson v. Ogden &c. R. Co., 7 Utah 396, 30 Pac. 305; White's Supp. to Thomp. Neg. § 4958, citing additional cases. See also Lills v. Great Northern R. Co., 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434, and note citing cases on both sides. The federal decisions are in a great measure controlled by the decision in Chicago, Mil. & St. Paul R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. ed. 787, and as that case has been virtually overruled the cases founded upon it can not be regarded as authority. Adjudging that the relation of fellow-servants exists: Keenan v. New York &c. R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. 654; Minneapolis v. Lunden, 58 Fed. 525; Sullivan v. New York &c. R. Co., 62 Conn. 209, 25 Atl. 711; Whittlesey v. New York &c. R. Co., 77 Conn. 100, 58 Atl. 459, 107 Am. St. 21; Messinger v. New York &c. R. Co., 85 Conn. 467, 83 Atl. 631; Clarke v. Pennsylvania Co., 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; New Pittsburg &c. Co. v. Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; Houser v. Chicago &c. R. Co., 60 Iowa 230, 14 N. W. 778, 46 Am. Rep. 65; Peterson v. Chicago &c. R. Co., 149 Iowa 496, 128 N. W. 932, 46 L. R. A. (N. S.) 766 n; Lawler v. Androscoggin &c. R. Co., 62 Maine 463, 16 Am. Rep. 492; Dube v. Lewiston, 83 Maine 211; Cumberland &c. R. Co. v. Scally, 27 Md. 589; Norfolk &c. R. Co. v. Hoover, 79 Md. 253, 29 Atl.

the authority to hire and discharge is the test.[52] Possibly the act of a foreman in hiring an incompetent servant, knowing him to be incompetent, may be the act of the employer, but as to the use of appliances, direction of the details of the work, and the like, pertaining entirely to the common duties of the service, we think the foreman, although he may have authority to employ and discharge servants, is not necessarily a superior agent. But it is not the name given an employe, nor, indeed,

994, 25 L. R. A. 710 and note, 47 Am. St. 392; Shepard v. Boston &c. R. Co., 158 Mass. 174, 33 N. E. 508; Dowd v. Boston &c. R. Co., 162 Mass. 185, 38 N. E. 440; Legrone v. Mobile &c. R. Co., 67 Miss. 592, 7 So. 432; Sherman v. Rochester &c. R. Co., 17 N. Y. 153; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; Ell v. Northern &c. R. Co., 1 N. Dak. 336, 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. 621; Kinney v. Corbin, 132 Pa. St. 341, 19 Atl. 141; Spancake v. Philadelphia &c. R. Co., 148 Pa. St. 184, 23 Atl. 1006, 33 Am. St. 821; Coal Creek &c. Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387; Johnson v. Ashland Water Co., 77 Wis. 51, 45 N. W. 807; White's Supp. to Thomp. Neg. § 4946, citing additional authorities. See generally Dewey v. Parke, 76 Mich. 631, 43 N. W. 644; McLean v. Blue Point &c. Co., 51 Cal. 255; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. 787; McBride v. Union Pac. R. Co., 3 Wyo. 47, 21 Pac. 687; Feltham v. England, L. R. 2 Q. B. 33; Searle v. Lindsay, 11 C. B. N. S. 429; Allen v. New Gas Co., L. R. 1 Exch. Div. 251; Howells v. London &c. Co., L. R. 10 Q. B. 62.

[52] In some jurisdictions authority to hire and discharge seems to be made a conclusive test both as to foreman and others. Chicago &c. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936; Texas &c. R. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058; Bryan v. Southern R. Co., 128 N. Car. 387, 38 S. E. 914; Blomquist v. Chicago &c. R. Co., 60 Minn. 426, 62 N. W. 818. This is frequently mentioned as one of the attributes of a vice-principal. See note in 51 L. R. A. 548. But while one having such power is a vice-principal in performing the master's duty of selecting competent servants, and while it is usually to be considered in other cases, we think that the better rule is that it is not of itself conclusive. Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. ed. 390; Cleveland &c. R. Co. v. Brown, 73 Fed. 970; Thomas v. Cincinnati &c. R. Co., 97 Fed. 245; Louisville &c. R. Co. v. Lile, 154 Ala. 556, 45 So. 699; New Pittsburg &c. Co. v. Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327; Hathaway v. Illinois Cent. R. Co., 92 Iowa 337, 342, 60 N. W. 651; Peters v. Michigan Cent. R. Co., 165 Mich. 217, 130 N. W. 602; Foster v. Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Hastings

the rank bestowed upon him, that controls, for the controlling question is whether he is entrusted with the performance of duties which rest upon the master. An employe may be called a foreman and yet not be a superior agent, or he may be so designated and yet be a superior agent. If he has charge of the working place and appliances, and is entrusted with the duty of providing safe appliances and a safe working place, then, so far as concerns that duty, he occupies the master's place and is a superior agent.[53] Some of the cases hold that a foreman is a superior agent although he has no authority to employ and discharge servants,[54] but the very great weight of authority is against that doctrine,[55] unless he represents the

v. Montana Union R. Co., 18 Mont. 493, 46 Pac. 264; Union Pac. R. Co. v. Doyle, 50 Nebr. 555, 90 N. W. 43; Webb v. Richmond &c. R. Co., 97 N. Car. 387, 2 S. E. 440.

[53] Nixon v. Selby &c. Co., 102 Cal. 458, 36 Pac. 803; McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. 181; Cleveland &c. R. Co. v. Beale, 42 Ind. App. 588, 86 N. E. 431; Thomas v. Ann Arbor R. Co., 114 Mich. 59, 72 N. W. 40; Carnahan v. Chicago &c. R. Co., 102 Nebr. 76, 165 N. W. 956; Houston v. Brush, 66 Vt. 431, 29 Atl. 380. See also for other instances in which he is a vice-principal in representing the master as to his positive duties: Addicks v. Cristoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. 687; Bloyd v. St. Louis &c. R. Co., 58 Ark. 66, 22 S. W. 1089, 41 Am. St. 85; Elledge v. National City R. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. 290; Carlson v. Northwestern &c. R. Co., 63 Minn. 428, 65 N. W. 428, and other authorities cited in note in 75 Am. St. 613, et seq.; Tabor v. St. Louis &c. R. Co., 210 Mo. 385, 109 S. W. 764, 124 Am. St. 728; and in 4 Thomp. Neg. § 4958. See Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; Fisher v. Oregon, 22 Ore. 533, 30 Pac. 425, 16 L. R. A. 519; Wellman v. Oregon &c. R. Co., 21 Ore. 530, 28 Pac. 625; Lantry &c. Constr. Co. v. McCracken, 53 Tex. Civ. App. 627, 117 S. W. 453; Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487. See also Illinois &c. R. Co. v. Marshall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297.

[54] Foster v. Missouri &c. R. Co., 115 Mo. 165, 21 S. W. 916; Hall v. St. Joseph &c. R. Co., 48 Mo. App. 356.

[55] Mealman v. Union &c. R. Co., 37 Fed. 189, 2 L. R. A. 192 and note; Chicago &c. R. Co. v. Simmons, 11 Ill. App. 147; Salem &c. Co. v. Chastain, 9 Ind. App. 453, 36 N. E. 910; Louisville &c. R. Co. v. Isom, 10 Ind. App. 691, 38 N. E. 423; Peterson v. Whitebreast &c. Co., 50 Iowa 673, 32 Am. Rep. 143; Schroeder v. Flint &c. R. Co., 103 Mich. 213, 61 N. W. 663, 29 L. R.

master and is negligent in relation to some positive duty of the master to the injured servant. One without any control or power to employ or discharge would ordinarily be a fellow servant while acting with others in a common employment to accomplish a common purpose of the master, but we think an employe might be a vice-principal as to a particular positive duty of the master without necessarily having authority to employ or discharge servants.

§ 1911 (1330). Trainmen engaged in operating the same train.—There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow servants, the very decided weight of authority holding them to be fellow-servants.[56] This seems to us the

A. 321, 50 Am. St. 354; Marshall v. Schricker, 63 Mo. 308; Mancuso v. Cataract &c. Co., 87 Hun 519, 34 N. Y. S. 273; Oerllich v. Hayes, 8 Misc. 211, 28 N. Y. S. 579; Berea &c. Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; New York &c. R. Co. v. Bell, 112 Pa. St. 400, 4 Atl. 164, 28 Am. & Eng. R. Cas. 338; Di Marcho v. Builders' &c. Co., 18 R. I. 514, 28 Atl. 661; Louisville &c. R. Co. v. Lahr, 86 Tenn. 335, 6 S. W. 663; San Antonio &c. R. Co. v. Reynolds (Tex. Civ. App.), 30 S. W. 846; Brabbitts v. Chicago &c. R. Co., 38 Wis. 289. The authorities referred to in a preceding note asserting that a foreman, although he has power to hire and discharge employes, is not necessarily a fellow-servant are, of course, fully in line with those here cited upon the general question. See also upon the general subject, the note in 75 Am. St. 632-634.

[56] Jordan v. Wells, 3 Woods (U. S.) 527; New Jersey &c. R. Co. v. Young, 49 Fed. 723; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728, 17 L. R. A. 190; Newport News &c. R. Co. v. Howe, 52 Fed. 362; Becker v. Baltimore &c. R. Co., 57 Fed. 188; Northern Pac. R. Co. v. Hogan, 63 Fed. 102; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Kansas &c. R. Co. v. Peavy, 29 Kans. 169, 44 Am. Rep. 630 and note, 11 Am. & Eng. R. Cas. 260; Wallis v. Morgan's &c. R. Co., 38 La. Ann. 156; Abell v. Western &c. R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503; Henry v. Lake Shore &c. R. Co., 49 Mich. 495, 13 N. W. 832; Paulmier v. Erie &c. R. Co., 34 N. J. L. 151; Sherman v. Rochester &c. R. Co., 17 N. Y. 153; Pittsburg &c. R. Co. v. Lewis, 33 Ohio St. 196; Frazier v. Pennsylvania &c. R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; East Tennessee &c. R. Co. v. Rush, 15 Lea (Tenn.) 145, 25 Am. & Eng. R. Cas. 502; Houston &c. R. Co. v. Myers, 55 Tex. 110, 8 Am. & Eng. R. Cas. 114; Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 582, 46 L. R. A. 359 and

only rule that can be defended on principle, for such employes are in the strictest sense engaged in the service of a common master, their service is of the same general character and the object of the service is a common one. The doctrine declared in a case[57] decided by the Supreme Court of the United States has created some conflict, and, as we venture to say, brought error into some of the decisions,[58] but the case to which we refer cannot be regarded as expressing the rule which now prevails in the federal courts.[59] We cannot perceive how the doctrine which declares that employes of the same train are not fellow servants can be upheld without violating the principle that the details of operating a railroad do not pertain to or form part of the master's duty.[60] Under the rule which we have stated, conductors, engineers, firemen, brakemen and baggage masters of the same train are fellow servants.[61] There

note, 64 Am. St. 791 (quoting text). See also McDaniel v. Charleston &c. R. Co., 70 S. Car. 95, 49 S. E. 2. Even in Kentucky a conductor and engineer on the same train are fellow-servants. Edmonson v. Kentucky Cent. R. Co., 105 Ky. 479, 49 S. W. 200, 201, 448 (citing text).

[57] Chicago Mil. & St. P. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. ed. 787. The case above mentioned is often cited under the title of Chicago &c. R. Co. v. Ross.

[58] Henchman v. Mackey, 35 Fed. 353; Mealman v. Union &c. R. Co., 37 Fed. 189, 2 L. R. A. 192 and note; Howard v. Denver &c. R. Co., 26 Fed. 837, 24 Am. & Eng. R. Cas. 448; Garrahy v. Kansas City &c. R. Co., 25 Fed. 258; Van Wickle v. Manhattan &c. R. Co., 32 Fed. 278; Van Avery v. Union &c. R. Co., 35 Fed. 40; Naylor v. New York &c. R. Co., 33 Fed. 801. But with the virtual overthrow of the doctrine of the Ross case many of the decisions (the federal decisions, of course) are left foundationless as authority.

[59] New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. ed. 181; Delaware &c. R. Co. v. Royse, 176 Fed. 331. In Illinois Cent. R. Co. v. Norris, 245 Fed. 926, however, a brakeman was held not to assume the risk of the conductor's negligence in directing the motion of the train while the brakeman was between cars performing his duties.

[60] Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 582, 46 L. R. A. 359 and note, 64 Am. St. 791 (quoting text).

[61] Howard v. Railway Co., 26 Fed. 837; Kerlin v. Chicago &c. R. Co., 50 Fed. 185; St. Louis &c. R. Co. v. Needham, 63 Fed. 107, 25 L. R. A. 833; Baltimore &c. R. Co. v. Atlanta &c. Co., 69 Fed. 358; Shugart v. Atlanta &c. R. Co., 133 Fed. 505; Delaware &c. R. Co. v. Royce, 176 Fed. 331; Southern &c.

are cases, however, which apply what is sometimes called the "doctrine of subordination" to trainmen performing service on the same train.[62] Conductors are usually considered in the line of decisions just referred to as superiors, and not as fellow servants, for which heresy the Ross case, so often referred to, is to a great extent responsible. But even those courts which

R. Co. v. McGill, 5 Ariz. 36, 44 Pac. 302; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 14 Ann. Cas. 816; Sanks v. Chicago &c. R. Co., 112 Ill. App. 385; Southern R. Co. v. Elliott, 170 Ind. 273, 82 N. E. 1051, 127 Am St. 363 n; Southern Ind. R. Co. v. Baker, 37 Ind. App. 405, 77 N. E. 64; Dow v. Kansas City &c. R. Co., 8 Kans. 642; Atchison &c. R. Co. v. Moore, 29 Kans. 632, 11 Am. & Eng. R. Cas. 243; Higgins v. Atchison &c. R. Co., 70 Kans. 814, 79 Pac. 679; Louisville &c. R. Co v. Hardy, 142 Ky. 468, 134 S. W. 899; Hayes v. Western &c. R. Co., 3 Cush. (Mass.) 270; Smith v. Potter, 46 Mich. 258, 9. N. W. 273, 41 Am. Rep. 161, 2 Am. & Eng. R. Cas. 140; Rodman v. Michigan &c. R. Co., 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521; Chicago &c. R. Co. v. Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; Broadwater v. Wabash R. Co., 212 Mo. 437, 110 S. W. 1084; Slater v. Jewett, 85 N. Y. 161, 39 Am. Rep. 627; Pearsall v. New York &c. R. Co., 189 N. Y. 474, 82 N. E. 752, 121 Am. St. 909; Johnston v. Pittsburg &c. R. Co., 114 Pa. St. 443, 7 Atl. 184; Ragsdale v. Memphis &c. R. Co., 3 Baxter (Tenn.) 426; Robinson v. Houston &c. R. Co., 46 Tex. 540. But see in Illinois, Chicago &c. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916. An instruction that an engineer might obey the conductor's order contrary to the train dispatcher's orders, the latter having precedence under the rules of the company, is held objectionable in Missouri &c. Ry. Co. v. Lenahan (Okla.), 171 Pac. 455.

[62] Chicago &c. R. Co. v. Moranda, 108 Ill. 576; Louisville &c. R. Co. v. Collins, 2 Duvall (Ky.) 118; Louisville &c. R. Co. v. Brooks, 83 Ky. 129, 4 Am. St. 135; Louisville &c. R. Co. v. Moore, 83 Ky. 675, 24 Am. & Eng. R. Cas. 443; Volz v. Railway Co., 95 Ky. 188, 24 S. W. 119; Cincinnati &c. R. Co. v. Palmer, 98 Ky. 382, 33 S. W. 199; Little Miami &c. R. Co. v. Stephens, 20 Ohio 415; Boatwright v. Northeastern &c. R. Co., 25 S. Car. 128; Moon v. Richmond &c. R. Co., 78 Va. 745, 49 Am. Rep. 401 and note, 17 Am. & Eng. R. Cas. 531; Richmond &c. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990, 19 Am. St. 876; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Madden v. Chesapeake &c. R. Co., 28 W. Va. 610, 57 Am. Rep. 695. See Alabama &c. R. Co. v. Baldwin, 113 Tenn. 409, 82 S. W. 487, 67 L. R. A. 340; Central &c. R. Co. v. DeBray, 71 Ga. 406; Richmond &c. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990, 19 Am. St. 876.

recognize and enforce the "doctrine of subordination" hold that employes on the same train of the same grade, as, for instance, brakemen, are fellow servants.[63]

§ 1912 (1331). **Trainmen operating different trains.**—It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employes are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service and by a common master.[64] The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow servants,[65] but there is some conflict of authority upon the question.[66]

[63] Chicago &c. R. Co. v. Howard, 45 Nebr. 570, 63 N. W. 872. See also Louisville &c. R. Co. v. Pearcy (Ky.), 121 S. W. 1037; Louisville &c. R. Co. v. Vincent, 116 Tenn. 317, 95 S. W. 179, 8 Ann. Cas. 66; Johnson v. Boston &c. R. Co., 78 Vt. 344, 62 Atl. 1021, 4 L. R. A. (N. S.) 856.

[64] Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 582, 46 L. R. A. 359 and note, 64 Am. St. 791 (quoting text).

[65] Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. ed. 746; Northern Pac. R. Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. ed. 72; Au v. New York &c. R. Co., 29 Fed. 72; Van Avery v. Union Pac. P. Co., 35 Fed. 40; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728, 17 L. R. A. 190; Rosney v. Erie R. Co., 135 Fed. 311; Vermillion v. Baltimore &c. R. Co., 38 App. D. C. 434, 52 L. R. A. (N. S.) 1136; Wheatley v. Philadelphia &c. R. Co., 1 Marv. (Del.) 505, 30 Atl. 660; McMaster v. Illinois Cent. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. 653; Relyea v. Kansas City &c. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Herrington v. Lake Shore &c. R. Co., 83 Hun 365, 31 N. Y. S. 910; Wright v. New York &c. R. Co., 25 N. Y. 562; Pittsburg &c. R. Co. v. Devinney, 17 Ohio St. 197; Norfolk &c. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk &c. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 582, 46 L. R. A. 359 and note, 64 Am. St. 791 (quoting text). See Vick v. New York &c. R. Co., 95 N. Y. 267, 47 Am. Rep. 36.

[66] Northern Pac. R. Co. v. Poirier, 67 Fed. 881 (reversed in 167 U. S. 48, 17 Sup. Ct. 741), 42 L. ed. 72; Kentucky &c. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691; Cincinnati &c. R. Co. v. Hill, 28 Ky. L. 530, 89 S. W. 523. See Madden v. Chesapeake &c. R. Co., 28 W. Va. 610, 57 Am. Rep. 695; Howard v. Denver &c. R. Co., 26 Fed.

§ 1913 (1332). Trainmen and switchmen and laborers and sectionmen.—The rule supported by the weight of authority is that section men and trainmen are fellow servants in all matters relating to the details of operating a railroad.[67] But this rule does not apply where the master's duty is devolved upon such employes. Some of the courts, however, hold that laborers and workmen engaged on the track are not the fellow servants of trainmen,[68] while other cases hold that while going to their work they are fellow servants of the employes engaged

837; Chicago &c. R. Co. v. Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Coleman v. Wilmington &c. R. Co., 25 S. Car. 446.

[67] Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Southern &c. R. Co. v. McGill, 5 Ariz. 36, 44 Pac. 302; St. Louis &c. R. Co. v. Shackelford, 42 Ark. 417; Elliott v. Chicago &c. R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363; Miller v. Ohio &c. R. Co., 24 Ill. App. 326; Ohio &c. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Wilson v. Madison &c. R. Co., 18 Ind. 226; Gormley v. Ohio &c. R. Co., 72 Ind. 31, 5 Am. & Eng. R. Cas. 581; Missouri &c. R. Co. v. Haley, 25 Kans. 35, 5 Am. & Eng. R. Cas. 594; O'Connell v. Baltimore &c. R. Co., 20 Md. 212, 83 Am. Dec. 549; Cumberland &c. R. Co. v. Scally, 27 Md. 589; Gillshannon v. Stony Brook &c. R. Co., 10 Cush. (Mass.) 228; Lawless v. Connecticut &c. R. Co., 136 Mass. 1, 18 Am. & Eng. R. Cas. 96; Loranger v. Lake Shore &c. R. Co., 104 Mich. 80, 62 N. W. 137; Swartz v. Great Northern R. Co., 93 Minn. 339, 101 N. W. 504; McGowan v. St. Louis &c. R. Co., 61 Mo. 528; Card v. Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806; Atchison &c. R. Co. v. Martin, 7 N. Mex. 158, 34 Pac. 536; Norfolk &c. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342; Heine v. Chicago &c. R. Co., 58 Wis. 525, 17 N. W. 420. See Neal v. Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312; Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771. The rule stated in the text is followed in Wickham v. Detroit United Ry., 160 Mich. 277, 125 N. W. 22, 52 L. R. A. (N. S.) 1082, Ann. Cas. 1913E, 1069 n, and shown in the note to that case as last reported to be the correct rule sustained by the great weight of authority. The cases are there reviewed, showing the application of the rule to particular classes of employes.

[68] Howard v. Delaware &c. Canal Co., 40 Fed. 195, 6 L. R. A. 75, 41 Am. & Eng. R. Cas. 473; McGill v. Southern &c. R. Co., 4 Ariz. 116, 33 Pac. 821; Chicago &c. R. Co. v. Kelly, 127 Ill. 637, 21 N. E. 203; Peoria &c. R. Co. v. Johns, 43 Ill. App. 83; Union Pac. R. Co. v. Geary, 52 Kans. 308, 34 Pac. 887; Parker v. Hannibal &c. R. Co., 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802; Swadley v. Missouri &c. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. 366; McKenna v. Missouri

in operating trains.[69] Switchmen and trainmen are generally held to be fellow servants.[70] It is, indeed, safe to affirm that

&c. R. Co., 54 Mo. App. 161; Chicago &c. R. Co. v. Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Burlington &c. R. Co. v. Crockett, 19 Nebr. 138, 26 N. W. 921, 24 Am. & Eng. R. Cas. 390; Dobbin v. Richmond &c. R. Co., 81 N. Car. 446, 31 Am. Rep. 512; Union &c. R. Co. v. Erickson, 41 Nebr. 1, 59 N. W. 347, 29 L. R. A. 137. In most of these jurisdictions, however, the different department doctrine is adopted in master and servant cases generally. Holding that they are fellow-servants, in addition to cases cited in preceding note, see Gormely v. Ohio &c. R. Co., 72 Ind. 31; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. ed. 999; Wright v. Southern R. Co., 80 Fed. 260; Fagundas v. Central Pac. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Connelly v. Minneapolis &c. R. Co., 38 Minn. 80, 35 N. W. 582; Bradford &c. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L. R. A. (N. S.) 1040 n, 8 Ann. Cas. 1077; Schelereth v. Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Smith v. Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; Haney v. Pittsburg &c. R. Co., 38 W. Va. 570, 18 S. E. 748, and note in 52 L. R. A. (N. S.) 1082-1106.

[69] Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994; Louisville &c. R. Co. v. Stuber, 108 Fed. 934, 54 L. R. A. 696; Abend v. Terre Haute &c. R. Co., 111 Ill. 202, 53 Am. Rep. 616 and note; Baltimore &c. R. Co. v. Clapp, 35 Ind. App. 403, 74 N. E. 267; Kilduff v. Boston Elev. R. Co., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873; Wright v. Northampton &c. R. Co., 122 N. Car. 852, 29 S. E. 100. See also Peoria &c. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; White v. Kennon, 83 Ga. 343, 9 S. E. 1082; Ellington v. Beaver &c. Co., 93 Ga. 53, 19 S. E. 21; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Chicago &c. R. Co. v. Kelly, 127 Ill. 637, 21 N. E. 203; Louisville &c. R. Co. v. Hawthorn, 147 Ill. 226, 35 N. E. 534; Chicago &c. R. Co. v. Gross, 35 Ill. App. 178, 133 Ill. 37, 24 N. E. 563; Austin &c. R. Co. v. Beatty, 6 Tex. Civ. App. 650, 24 S. W. 934. But the contrary has been held in a few cases, most of which are decided under the different department doctrine. St. Louis &c. R. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295; Dobson v. New Orleans &c. R. Co., 52 La. Ann. 1127, 27 So. 670; Nocita v. Omaha &c. R. Co., 89 Nebr. 209, 131 N. W. 214; Trinity &c. R. Co. v. Geary (Tex. Civ. App.), 144 S. W. 1045; Jachetta v. San Pedro &c. R. Co., 36 Utah 470, 105 Pac. 100, 52 L. R. A. (N. S.) 1106. Compare also Thode v. Louisiana Ry. Co., 142 La. 138, 76 So. 587.

[70] Smith v. Memphis &c. R. Co., 18 Fed. 304; Naylor v. New York &c. R. Co., 33 Fed. 801; Slavens v. Northern Pac. R. Co., 97 Fed. 255;

upon principle, as well as according to the weight of authority, employes whose duties bring them together in relation to the running and movement of trains, whether they are track-walkers, track-repairers, bridgemen or laborers, are fellow servants,[71] and the master is not liable unless there was a violation of a positive duty which he owed to the injured employe. So, a

St. Louis &c. R. Co. v. Brown, 67 Ark. 295, 54 S. W. 865; Chicago &c. R. Co. v. Touhy, 26 Ill. App. 99; Slattery v. Toledo &c. R. Co., 23 Ind. 81; Satterly v. Morgan, 35 La. Ann. 1166; Day v. Louisiana &c. R. Co., 121 La. 180, 46 So. 203; Roberts v. Chicago &c. R. Co., 33 Minn. 218, 22 N. W. 389; Rutledge v. Missouri &c. R. Co., 123 Mo. 121, 27 S. W. 327; Card v. Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806; Miller v. Southern &c. R. Co., 20 Ore. 285, 26 Pac. 70, 43 Alb. L. J. 354; Guthrie v. Southern &c. R. Co. (Ore.), 26 Pac. 76; Dealey v. Philadelphia &c. R. Co., 2 Sad. (Pa.) 224, 4 Atl. 170, 21 W. N. C. 45; Fowler v. Chicago &c. R. Co., 61 Wis. 159, 21 N. W. 40, 17 Am. & Eng. R. Cas. 536. See generally Fagundes v. Central &c. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824.

[71] Easton v. Houston &c. R. Co., 32 Fed. 893; Tomlinson v. Chicago &c. R. Co., 97 Fed. 252; St. Louis &c. R. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, 11 L. R. A. 773; St. Louis &c. R. Co. v. Henson, 61 Ark. 302, 32 S. W. 1079; Parrish v. Pensacola &c. R. Co., 28 Fla. 251, 9 So. 696; Chicago &c. R. Co. v. Geary, 110 Ill. 383; Wilson v. Madison &c. R. Co., 18 Ind. 226; Capper v. Louisville &c. R. Co., 103 Ind. 105, 2 N. E. 749, 53 Am. Rep. 495; Spencer v. Ohio &c. R. Co., 130 Ind. 181, 29 N. E. 915; Cassiday v. Maine Cent. R. Co., 76 Maine 488; Seaver v. Boston &c. R. Co., 14 Gray (Mass.) 466; Illinois &c. R. Co. v. Bishop, 76 Miss. 758, 25 So. 867; Higgins v. Missouri &c. R. Co., 104 Mo. 413, 16 S. W. 409; Parker v. Hannibal &c. R. Co., 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802, 35 Cent. L. J. 187, 46 Alb. L. J. 286; Coon v. Syracuse &c. R. Co., 5 N. Y. 492; Ford v. Lake Shore &c. R. Co., 117 N. Y. 638, 22 N. E. 946, 41 Am. & Eng. R. Cas. 369; Corcoran v. Delaware &c. R. Co., 126 N. Y. 673, 27 N. E. 1022; Mele v. Delaware &c. R. Co., 14 N. Y. 630; Kirk v. Atlanta &c. R. Co., 94 N. Car. 625, 55 Am. Rep. 621; Rittenhouse v. Wilmington &c. R. Co., 120 N. Car. 544, 26 S. E. 922; Knahtla v. Oregon &c. R. Co., 21 Ore. 136, 27 Pac. 91; Wellman v. Oregon &c. R. Co., 21 Ore. 530, 28 Pac. 625; East Tennessee &c. R. Co. v. Rush, 15 Lea (Tenn.) 145; International &c. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219; Rose v. Gulf &c. R. Co. (Tex.) 17 S. W. 789; Corona v. Galveston &c. R. Co. (Tex.) 17 S. W. 384; Stephani v. Southern &c. R. Co., 19 Utah 196, 57 Pac. 34; Unfried v. Baltimore &c. R. Co., 34 W. Va. 260, 12 S. E. 512; Schultz v. Chicago &c. R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881; Ewald v. Chicago &c. R. Co., 70 Wis. 420, 36 N. W. 12, 5 Am. St. 178; Waller

flagman has been held to be a fellow-servant of employes running trains, even in passing across tracks to and from the place where he is stationed.[72] Even those courts which act upon the department theory, except a few courts which take a very extreme view of the question, recognize the general rule stated, but some of the courts decline to lay down any general rules, asserting that each case must be determined on its particular facts.

§ 1914. Towermen and block signal men as fellow servants of trainmen.—There is sharp conflict among the authorities as to whether a towerman or block signal man is a fellow servant of trainmen so as to relieve the company from injury to the latter caused by his negligence. As already shown it is generally regarded as the master's duty to regulate the running of trains and train dispatchers having this duty to perform are usually held to be vice-principals rather than fellow servants. Some courts have placed towermen and block signal men in the same category with train dispatchers and held that they are vice-principals.[73] But many other courts liken the duties

v. Southwestern &c. R. Co., 2 Hurl. & C. 102; and other illustrative cases reviewed in note in 52 L. R. A. (N. S.) 1082, et seq. But see Pike v. Chicago &c. R. Co., 41 Fed. 95; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675; Southerland v. Northern Pac. R. Co., 43 Fed. 646; Louisville &c. R. Co. v. Ward, 61 Fed. 927; Northern Pac. R. Co. v. Beaton, 64 Fed. 563; Louisville &c. R. Co. v. Davis, 91 Ala. 487, 8 So. 552; Miller v. Missouri &c. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. 673; Schlereth v. Missouri &c. R. Co., 115 Mo. 87, 19 S. W. 1134; Bean v. Western &c. R. Co., 107 N. Car. 731, 12 S. E. 600; Missouri &c. R. Co. v. Hines (Tex. Civ. App.), 40 S. W. 152 (but compare St. Louis &c. R. Co. v. Welsh, 72 Tex. 298, 10 S. W. 529); Pool v. Southern &c. R. Co., 7 Utah 303, 26 Pac. 654; Torian v. Richmond &c. R. Co., 84 Va. 192, 4 S. E. 339; Daniel v. Chesapeake &c. R. Co., 36 W. Va. 397, 15 S. E. 162, 16 L. R. A. 383, 32 Am. St. 870.

[72] O'Neill v. Pittsburgh &c. R. Co., 130 Fed. 204. But the conductor and engineer of a logging train have been held not to be fellow-servants of a helper on a log loader used in loading cars of the train. Buskirk v. Candill, 181 Ky. 45, 203 S. W. 864.

[73] Messinger v. New York &c. R. Co., 85 Conn. 469, 83 Atl. 631; Haney v. Pittsburg &c. R. Co., 38 W. Va. 570, 18 S. E. 748; Flannagan v. Chesapeake &c. R. Co., 40

of such employes more nearly to those of a telegraph operator having to do with details of the work of operating the particular train rather than with the general subject. Most of the recent cases take this view, which seems to be the better one, and hold that they are fellow servants of the trainmen.[74]

§ 1915 (1333). Recent federal cases.—Since the original preparation of a great part of the text of this chapter the Supreme Court of the United States has made two decisions which completely overthrow some of the federal cases criticised by us. The decisions of the Supreme Court to which we refer[75] practically deny much of the doctrine asserted in the Ross case, and assert a rule which is in line with that asserted by most of the state courts. The decisions referred to adjudge that the

W. Va. 436, 21 S. E. 1028, 52 Am. St. 896; Salmons v. Norfolk &c. R. Co., 162 Fed. 722. See also Welch v. New York &c. R. Co., 176 Mass. 393, 57 N. E. 668 (under Massachusetts Employers Liability Act).

[74] Vermillion v. Baltimore &c. R. Co., 38 App. D. C. 434, 52 L. R. A. (N. S.) 1136; Stever v. Ann Arbor R. Co., 160 Mich. 207, 125 N. W. 47, 52 L. R. A. (N. S.) 1139, 136 Am. St. 433; Buteau v. New York &c. R. Co., 35 R. I. 545, 87 Atl. 324, 52 L. R. A. (N. S.) 1127. See also Cleveland &c. R. Co. v. Lawler, 94 Ill. App. 36; Tillson v. Maine Cent. R. Co., 102 Maine 463, 67 Atl. 407; Pearsall v. New York &c. Co., 189 N. Y. 474, 82 N. E. 752, 121 Am. St. 909 (employe in charge of semaphore fellow-servant of engineer); Lake Shore &c. R. Co. v. Burtscher, 74 Ohio St. 523, 78 N. E. 1129.

[75] Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994; Northern Pacific &c. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. ed. 999. The judgments in the cases of Northern Pacific v. Peterson, 51 Fed. 182, and Northern Pacific R. Co. v. Charless, 51 Fed. 562 were reversed. With the reversal of those cases many other cases must fall, for many are built on the Ross case, and, indeed, have gone much beyond it. The cases of Baltimore &c. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Howard v. Denver &c. R. Co., 26 Fed. 837; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009, and Central Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. ed. 418, are approved in the cases first cited. The case of Cleveland &c. R. Co. v. Brown, 56 Fed. 804, heretofore cited, is overturned by the recent decisions and a decision in the same case has been announced declaring a radically different rule from that originally asserted. Cleveland &c. R. Co. v. Brown, 73 Fed. 970.

foreman of a gang of men is a fellow servant, not a superior agent. The court said: "The general rule is that those entering the service of a common master become thereby engaged in a common service and are fellow servants, and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant."[76] And, since the publication of the first edition of this work, it has been expressly stated by the Supreme Court of the United States that the Ross case must be deemed to have been overruled insofar, at least, as it is to be understood as laying down the rule that a conductor, merely from his position as such, is a vice-principal.[77]

§ 1916 (1333a). **Other recent cases — Miscellaneous.** — The varying doctrines prevailing in different jurisdictions as to the fellow-servant rule, have been considered in the preceding sections of this chapter, and we have stated what we regard as the true doctrine and test for determining whether one is to be regarded as a fellow servant of another or as a vice-principal, in the absence of a statute changing the common-law rule. Many

[76] It was also held in Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. ed. 999, that negligence in running a hand-car was not the negligence of the employer, inasmuch as it was "not the neglect of any duty which the company, as master, was bound itself to perform." This is in harmony with the doctrine that the master's duty does not extend to matters of detail in the operation of the railroad which we have heretofore discussed.

[77] New England &c. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. ed. 181. See also for the recent cases as to the test adopted by that court, the prevailing and dissenting opinions and cases reviewed in both in Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006; also Santa Fe &c. R. Co. v. Holmes, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. ed. 1094 (train dispatcher not fellow-servant); Northern Pac. R. Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. ed. 72; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. ed. 390; McCabe &c. Constr. Co. v. Wilson, 209 U. S. 275, 28 Sup. Ct. 558, 52 L. ed. 788 (not fellow-servant where performing master's non-delegable duty); Texas &c. R. Co. v. Bourman, 212 U. S. 536, 29 Sup. Ct. 319, 53 L. ed. 641; American Bridge Co. v. Seeds, 144 Fed. 605; Illinois Cent. R. Co. v. Hart, 176 Fed. 245, 52 L. R. A. (N. S.) 1117.

illustrative cases have been cited and reviewed, and the application of the doctrine to particular classes has been pretty fully considered. But it may be well to refer to a few recent additional cases upon the subject. In a Colorado case it appeared that the plaintiff's intestate, his foremen, and defendant's roadmaster were all engaged in removing debris from defendant's track, caused by a landslide into a cut; during the afternoon one of the section foremen had been warned that the adjoining mountain side was dangerous, and in the evening the roadmaster stated, in the hearing of those present, that he had examined the mountain side before dark and that it was all right; thereafter several of the employes, including plaintiff's intestate, were killed by a rock which rolled down the side of the mountain during the night. The court held that all engaged in the work were fellow servants, and that plaintiff's intestate assumed the risk of the roadmaster's negligence in failing to properly inspect the mountain side.[78] In Georgia, except as the statute changes the rule in case of railroad companies, the general rule is recognized that it is not the grade or title that determines, whether one is a fellow servant or a vice-principal, but the duty which he performs towards the other servants; and among the nonassignable duties of the master are providing machinery and appliances, the place to work, inspection and repair, selection and retention of servants, establishment of proper rules and regulations and the instruction of servants.[79] In Illinois, although a foreman or superintendent is not necessarily a vice principal,[80] even a subordinate employe may be a vice principal as to a nonassignable duty entrusted to him, and an employe directing a gang of men engaged in loading rails on a flat car and controlling the manner of performing the work, has been held a vice principal and not a fellow servant even though he had no power to employ or discharge the men.[81]

[78] Maloney v. Florence &c. R. Co., 39 Colo. 384, 89 Pac. 649, 19 L. R. A. (N. S.) 348 n, 121 Am. St. 180, 12 Ann. Cas. 621.

[79] Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772 n, citing numerous cases.

[80] Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65.

[81] Chicago &c. R. Co. v. Rathneau, 225 Ill. 278, 80 N. E. 119.

In Massachusetts it is held that instructions received from a co-employe, to whom the duty of giving instructions has been delegated by the master, are the instructions of the master and negligence in giving them is negligence of the master.[82] In Michigan, keeping switches closed and locked while not in use is not one of the nonassignable duties of the company to its employes, but may be delegated.[83] In Texas a roadmaster in discharging his duty of seeing that the track is in good and safe condition has been held not to be a fellow servant with a fireman.[84] In a very recent case in Utah it appeared that the defendant railroad company's superintendent of bridges had general supervision and control of the bridge work on its line and the crews of men engaged therein; one of such crews, of which plaintiff was a member, consisted of four men, with whom was also a foreman, who directed where they should work and what they should do. A push car without any brake was used, and the foreman directed a scantling to be put on the car to be used as a brake, and in going down a grade directed one of the crew to so use the scantling. In doing so it was jerked from his hand, and, striking the ground in front of the car, derailed it, thereby throwing plaintiff to the ground and injur-

See also Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65; Springfield &c. Co. v. Sloan, 225 Ill. 467, 80 N. E. 265. As to Illinois Con-Association doctrine, see Aldrich v. Illinois Cent. R. Co., 241 Ill. 402, 89 N. E. 702, 132 Am. St. 220; Bennett v. Chicago &c. R. Co., 243 Ill. 420, 90 N. E. 735.

[82] Morena v. Winston, 194 Mass. 378, 80 N. E. 473. See also for a case in which the question as to whether negligence of a dispatcher under the statute making the master liable for negligence of one exercising superintendence, was held for the jury. Doe v. Boston &c. St. R. Co., 195 Mass. 168, 80 N. E. 814.

[83] Dixon v. Grand Trunk &c. R. Co., 147 Mich. 667, 111 N. W. 200, citing St. Louis &c. R. Co. v. Needham, 63 Fed. 107, 25 L. R. A. 833; Harvey v. New York &c. R. Co., 88 N. Y. 481; Walker v. Boston &c. R. Co., 128 Mass. 8; Roberts v. Chicago &c. R. Co., 33 Minn. 218, 22 N. W. 389; Miller v. Southern Pac. R. Co., 20 Ore. 285, 26 Pac. 70; Henry v. Ann Arbor R. Co., 140 Mich. 446, 103 N. W. 846.

[84] Chicago &c. R. Co. v. Birk, 44 Tex. Civ. App. 615, 99 S. W. 753. See also as to foreman, machinist and assistant. Texas &c. R. Co. v. Johnson (Tex. Civ. App.), 99 S. W. 738.

ing him. It was held that the foreman was a fellow servant of plaintiff as to the matter which caused the plaintiff's injury.[85] Other recent decisions upon the general subject are cited below.[86]

§ 1917 (1333b). **Fellow-servant doctrine not available to a stranger.**—It must be understood, if it does not already sufficiently appear, that the doctrine that a servant accepts the risk of injury from the negligence of a fellow servant is available only to the common master of both and not to a stranger.[87] As said by Judge Sanborn: "The fellow-servant doctrine, where it is not abolished or modified by statute, exempts the common master only, from damages caused by the negligence of the fellow servant. That the negligence of the master or of the fellow servant contributed to an injury, the proximate cause of which was the negligence of a stranger, is no defense to the latter. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence."[88] Thus it has been

[85] Owen v. San Pedro &c. R. Co., 32 Utah 208, 89 Pac. 825.

[86] See Britt v. Carolina &c. R. Co., 144 N. Car. 242, 56 S. E. 910; Gila Valley, G. & N. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. ed. 276; Texas &c. R. Co. v. Bourman, 212 U. S. 536, 29 Sup. Ct. 319, 53 L. ed. 641 (engineer and section foreman fellow-servants of section hand); New York &c. R. Co. v. Dailey, 179 Fed. 289 (hostlers); Tay v. Willmar &c. R. Co., 100 Minn. 131, 110 N. W. 433; Mack v. Chicago &c. R. Co., 123 Mo. App. 531, 101 S. W. 142; Bell v. Rocheford, 78 Nebr. 304, 110 N. W. 646, 126 Am. St. 595; Laughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854; Anglin v. American &c. Co., 96 N. Y. S. 49, affirmed in 79 N. E. 1100; Lyon v. Charleston &c. R. Co., 77 S. Car. 328, 56 S. E. 18. A few cases are cited in the notes to this section that are not railroad cases, and it may be proper to suggest, by way of caution, applicable elsewhere as well as here, that in some jurisdictions the fellow-servant rule is changed by statute as to railroad companies and not as to other employers.

[87] Ft. Worth &c. R. Co. v. Mackney, 83 Tex. 410, 18 S. W. 949; Chicago &c. R. Co. v. Chambers, 68 Fed. 148; Gray v. Philadelphia &c. R. Co., 24 Fed. 168; Busch v. Buffalo Creek R. Co., 29 Hun (N. Y.) 112.

[88] Chicago &c. R. Co. v. Chambers, 68 Fed. 148; citing Chicago &c. R. Co. v. Sutton, 63 Fed. 394; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. ed. 266; Gray v. Philadelphia &c. R. Co., 24 Fed. 168; New Jer-

held that a railroad company using the tracks of another company and injuring a servant while so doing cannot avoid liability for the injury, on the ground that the negligence of a fellow servant of the employe injured, contributed to the accident.[89] So, it has been held that a statute giving employes the same rights and remedies as others for any injuries suffered by reason of the act or omission of the company or its employes, abolishes the fellow servant doctrine.[90]

§ 1918 (1333c). Fellow servants in street railway operation.—The fellow-servant relation has been held to exist between these employes: The conductor and motorman of the same car;[91] the conductor of one car and the motorman[92] or gripman[93] of another car; the watchman stationed at a curve of a cable street railway to prevent cars from meeting on the curve and

sey &c. R. Co. v. Young, 49 Fed. 723; Union Pac. R. Co. v. Callaghan, 56 Fed. 938; Cayzer v. Taylor, 10 Gray (Mass.) 274; Lane v. Atlantic Works, 111 Mass. 136; Elmer v. Locke, 135 Mass. 575; Griffin v. Boston &c. R. Co., 148 Mass. 143, 19 N. E. 166; Cone v. Delaware &c. R. Co., 81 N. Y. 206; Booth v. Boston &c. R. Co., 73 N. Y. 38; Coppins v. New York Cent. R. Co., 122 N. Y. 557, 25 N. E. 915; Harriman v. Pittsburg &c. R. Co., 45 Ohio St. 11, 12 N. E. 451; Ft. Worth &c. R. Co. v. Mackney, 83 Tex. 410, 18 S. W. 949.

[89] Ft. Worth &c. R. Co. v. Bell, 5 Tex. Civ. App. 28, 23 S. W. 922. See also Hamble v. Atchison &c. R. Co., 164 Fed. 410, 22 L. R. A. (N. S.) 323; Pittsburg &c. R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128; Floody v. Chicago &c. R. Co., 109 Minn. 228, 123 N. W. 815, 134 Am. St. 771, 18 Ann. Cas. 274; Schoen v. Chicago &c. R. Co., 112 Minn. 38, 127 N. W. 433, 45 L. R. A. (N. S.) 841n; Gulf &c. R. Co. v. Gaskill, 103 Tex. 441, 129 S. W. 345.

[90] Illinois Cent. R. Co. v. Ford, 108 Miss. 616, 67 So. 145.

[91] Hinckley v. Danbury, 81 Conn. 241, 70 Atl. 590; Savage v. Nassau Elec. R. Co., 42 App. Div. 241, 59 N. Y. S. 225, affirmed in 168 N. Y. 680, 61 N. E. 1134; Houts v. St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Craig v. Great Northern R. Co., 56 Wash. 640, 106 Pac. 155. And between motorman of repair car and custodian of tools therein, Waszkiewicz v. Milwauke Elec. R. Co., 147 Wis. 422, 133 N. W. 596.

[92] Birmingham &c. R. Co. v. Mosely, 164 Ala. 111, 51 So. 424; Stocks v. St. Louis Transit Co., 106 Mo. App. 129, 79 S. W. 1176. See also Murtaugh v. Joline, 119 N. Y. S. 218; Berg v. Seattle &c. R. Co., 44 Wash. 14, 87 Pac. 34, 120 Am. St. 968.

[93] Chicago &c. R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222.

the gripman on one of the cars;[94] a conductor and a car starter;[95] and a conductor off duty and riding on a car while ill without payment of fare and the motorman.[96] On the other hand, the relation has been held not to exist between the gripman of a cable car and a member of the crew of a wrecking train.[97] Similarly it has been held that one employed to lay tracks for a street railway company with transportation to and from the work as part consideration, and who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car or any car, is not a fellow servant of the employes operating the car on which he is being so transported.[98] And in a recent case where a street car conductor was struck by an incoming street car at a terminal by reason of a starter leaving a switch open and there was evidence sufficient to show that the starter was a vice-principal, it was held that the fact that he personally opened the switch did not make him a fellow servant of the conductor.[99]

§ 1919. Negligence of master concurring with that of fellow servant.—If negligence of the master concurs with that of a fellow servant as a proximate cause of the injury complained of the fellow-servant doctrine does not apply so as to relieve the master. This is well settled.[1] But the negligence of the

[94] Murray v. St. Louis &c. R. Co., 98 Mo. 573, 12 S. W. 252, 5 L. R. A. 735. See also Cox v. Delaware &c. R. Co., 128 App. Div. 363, 112 N. Y. S. 443.

[95] Shaw v. Manchester St. R. Co., 73 N. H. 65, 58 Atl. 1073. But see Pierce v. Chicago City R. Co., 202 Ill. App. 67; Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883.

[96] McLaughlin v. Interurban St. R. Co., 101 App. Div. 134, 91 N. Y. S. 383. But compare Harris v. City &c. R. Co., 69 W. Va. 65, 70 S. E. 859, 50 L. R. A. (N. S.) 706 n, Ann. Cas. 1912D, 59 n.

[97] West Chicago St. R. Co. v. Dwyer, 57 Ill. App. 440; Milton v. Frankfort &c. Trac. Co., 139 Ky. 53, 129 S. W. 322.

[98] Peterson v. Seattle Trac. Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543.

[99] Pierce v. Chicago City Ry. Co., 202 Ill. App. 69.

[1] Standard Oil Co. v. Brown, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. ed. 939, 20 Ann. Cas. 1061; McClintic &c. Constr. Co. v. Forgy, 246 Fed. 193; Chicago &c. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936 (company liable when injury caused by combined negligence of vice-principal

master must, in all cases, be a proximate cause of the injury complained of.[2]

§ 1920. **Question of fellow servant or vice-principal one of law or of fact.**—It has been held in some cases that the question as to whether one employe is a fellow servant of another is a question of fact for the jury to determine under the circumstances of each particular case.[3] But this certainly can not be true in many cases. It may be a question of fact, or a mixed question of law and fact, for the jury to determine under proper instructions where there is conflicting evidence as to the common employment or the duties and acts of the employes; but where, as is usually the case, there is no dispute as to the employment or the rank and duties of the employe and the character of the act the question as to whether he is a vice-principal or a fellow servant must, ordinarily at least, be one of law. If this were not so the numerous decisions referred to in other sections of this chapter adjudging that certain classes of employes performing nondelegable duties of the master are vice-principals and that certain other employes are fellow servants in performing certain acts could not have been made. So, too, there are decisions directly and expressly holding that the question is one of law.[4]

and fellow-servant); Nordhaus v. Vandalia R. Co., 242 Ill. 166, 89 N. E. 974; Root v. Kansas City &c. R. Co., 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212; Henry v. Hudson &c. R. Co., 201 N. Y. 140, 94 N. E. 623; Watson v. Atlantic &c. R. Co., 91 S. Car. 127, 74 S. E. 121; St. Louis &c. R. Co. v. Cleland, 50 Tex. Civ. App. 499, 110 S. W. 122; Stone v. Union Pac. R. Co., 35 Utah 305, 100 Pac. 362; Hillis v. Spokane &c. R. Co., 60 Wash. 7, 110 Pac. 624.

[2] Fraser v. Smith, 136 Ga. 18, 70 S. E. 792; Haskell &c. Car Co. v. Przezdziankowski, 170 Ind. 1, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. 352; Cabin Branch Min. Co. v. Hutchinson, 112 Va. 37, 70 S. E. 480, Ann. Cas. 1912D, 93 n.

[3] Chicago &c. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916; Louisville &c. Consol. R. Co. v. Hawthorn, 147 Ill. 226, 35 N. E. 534, 37 Am. St. 213. See also Webb v. Denver &c. R. Co., 7 Utah 363, 26 Pac. 981; Pittsburgh &c. R. Co. v. Cole, 260 Fed. 354.

[4] Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 Sup. Ct. 382, 33 L. ed. 651; Chapman v. Reynolds, 77 Fed. 274; Keller v. Gaskill, 20 Ind. App. 502, 50 N. E. 363; Whitmore v. Boston &c. R. Co., 150 Mass. 477, 23 N. E. 220; Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; Torian v. Richmond &c. R. Co., 84 Va. 192, 4 S. E. 339.

CHAPTER LVII

EMPLOYERS' LIABILITY ACTS

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§ 1925 (1334). Changes in the law of master and servant by legislation—Generally.—In England, and in many of the Amer-

ican states, great changes in the law of master and servant have been made by legislative enactments. The statutes of the different states differ from one another in many respects, but all proceed upon the same general lines. These statutes are usually denominated "Employers' Liability Acts,"[1] and some of them limit the right of contract, or attempt to classify without good reason, and essentially, as it seems to us, violate the provisions of the constitution. The courts, however, have been strongly inclined to sustain laws regulating the subject of master and servant, and have upheld most of the statutes and some that are of questionable validity. But the courts have, in some cases, refused to sustain legislation upon this subject, and overthrown statutes which unduly abridged the right of contract.[2] Many duties have been added to those imposed upon the employer by the common law, and the obligations and liabilities of classes of employers enlarged and increased.[3] While the statutes work radical changes in the law of master and servant and greatly abridge the defense of common employment, they

[1] For states in which such statutes have been passed, and the substance of the various statutes, see 4 Thomp. Neg. § 5278, et seq.; White's Supp. Thomp. Neg. §§ 5289a—5310; note in 47 L. R. A. (N. S.) 84.

[2] Post, § 1927. Many that go very far in this direction have, however, been upheld. McGuire v. Chicago &c. R. Co., 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; and other cases there cited in opinions and note. See also Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867.

[3] It has been held that a statute relating to railroad companies does not apply to street railway companies. Funk v. St. Paul &c. R. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. 608; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Hughes v. Indiana Un. Trac. Co., 57 Ind. App. 202, 105 N. E. 537 (nor to an interurban railway); McLeod v. Chicago &c. Ry. Co., 125 Iowa 270, 101 N. W. 77; Fallon v. West End St. Ry. Co., 171 Mass. 249, 50 N. E. 536; Landquist v. Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006; Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826; Jones v. Milwaukee Elec. &c. R. Co., 147 Wis. 427, 133 N. W. 636. See also Stams v. St. Louis &c. R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; Conover v. Public Service R. Co., 80 N. J. L. 681, 78 Atl. 187; Whatley v. Zenida &c. Co., 122 Ala. 118, 26 So. 124 (but compare Birmingham &c. R. Co. v. Mosely, 164 Ala. 111, 51 So. 424). But see contra Patton

do not, as a general rule, entirely abrogate it, for such statutes are to be construed according to the ordinary canons of statutory construction, and under those canons the common law rules may be considered in connection with the statute, and are not to be regarded as swept away unless the statute expressly or impliedly so provides.[4] It has been held that it is erroneous to charge the jury that a railroad company is liable "to any person in its employment." The doctrine of the case referred to we believe to be sound, for, as elsewhere indicated, we think it clear that the defense of common employment is

v. Los Angeles &c. Co., 18 Cal. App. 522, 123 Pac. 613. And compare Kent v. Jamestown St. R. Co., 205 N. Y. 361, 98 N. E. 664, Ann. Cas. 1913E, 553 n; Brookshire v. Asheville Elec. Co., 152 N. Car. 669, 68 S. E. 215. So, it has been held that a corporation chartered for the purpose of conducting the business of manufacturing lumber is not a railroad within the meaning of the statute, although it is authorized to use, and does use, locomotives and cars. Ellington v. Beaver Dam &c. Co., 93 Ga. 53, 19 S. E. 21; Williams v. Northern Lumber Co., 113 Fed. 382. See also Boggs v. Alabama &c. Coal Co., 167 Ala. 251, 52 So. 878, 140 Am. St. 28; Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48, 10 L. R. A. 839; Givens v. Southern R. Co., 94 Miss. 830, 49 So. 180, 22 L. R. A. (N. S.) 971. But the contrary has also been held. Liles v. Fosburg Lumber Co., 142 N. Car. 39, 54 S. E. 795; Hemphill v. Lumber Co., 141 N. Car. 487, 54 S. E. 420; Schus v. Powers &c. Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887. See also Hines v. Stanley &c. Elec. Mfg. Co., 199 Mass. 522, 85 N. E. 851; Gluies v. Oliver &c. Min. Co., 108 Minn. 278, 122 N. W. 161; Schoen v. Chicago &c. R. Co., 112 Minn. 28, 127 N. W. 433. In another case it was held that a railroad company operating several lines is within the statute. Moran v. Eastern R. Co., 48 Minn. 46, 50 N. W. 930, citing Schneider v. Chicago &c. R. Co., 42 Minn. 68, 43 N. W. 783. See generally ante, § 1. Held not to apply to a construction company in Bradford &c. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L. R. A. (N. S.) 1040 n, 8 Ann. Cas. 1077.

[4] In Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112, it was said: "The statute is to be fairly construed (Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667 and note); and while it removes the defense of common employment in some cases it does not extinguish it altogether." See also Baltimore &c. R. Co. v. Little, 149 Ind. 167, 48 N. E. 862; American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986. And compare Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 137, 11 So. 803, 18 L. R. A. 433, 38 Ann. Cas. 163; Colorado &c. R. Co. v. Mitchell, 26 Colo. 284, 58 Pac. 28; Clare v.

not entirely extinguished, but remains as at common law, except in so far as it is clearly taken away by the statute.[5] A comparatively recent Federal statute, known as the Federal Employers' Liability Act, has superseded most, if not all, of such state statutes to some extent, but in domestic or intrastate cases such statutes are generally still in force and effective, not being controlled by any Federal Act, and the decisions under them are also of value in many instances in construing and applying the Federal statute.

§ 1926 (1335). Validity of statutes.—We have at another place referred to cases affirming that statutes declaring who shall not be deemed fellow-servants and prescribing the duties and liabilities of employers are constitutional.[6] To the authorities cited others may be added.[7] It seems difficult in those

New York &c. R. Co., 172 Mass. 211, 51 N. E. 1083; Griffiths v. Earl of Dudley, 9 Q. B. 357.

[5] Western &c. R. Co. v. Vandiver, 85 Ga. 470, 11 S. E. 781. As bearing upon the construction of the Georgia statute the court cited Central R. v. Sears, 59 Ga. 436; Central Railroad Co. v. Kelly, 58 Ga. 107; Central R. Co. v. Kenney, 58 Ga. 485; Savannah &c. R. Co. v. Barber, 71 Ga. 644; Central R. Co. v. Small, 80 Ga. 519, 5 S. E. 794. See also Southern Ind. R. Co. v. Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; Pittsburg &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 683; Birmingham &c. Co. v. Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457. As to differences in Colorado statutes, see Kett v. Colorado &c. Ry. Co., 58 Colo. 392, 146 Pac. 245; and Carlock v. Denver &c. R. Co., 55 Colo. 146, 133 Pac. 1103, disapproving and refusing to follow Lange v. Union Pac. R. Co., 126 Fed. 338.

[6] Ante, § 782.

[7] Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. ed. 109; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675; Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. ed. 192; St. Louis &c. Term. Ry. Co. v. Callahan, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. ed. 1157-1162; Chicago &c. R. Co. v. Stahley, 62 Fed. 363; Kane v. Erie R. Co., 133 Fed. 681, 68 L. R. A. 788; Kibbe v. Stevenson &c. Co., 136 Fed. 147; Indianapolis Un. Ry. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, and note in 58 L. R. A. 33. McAunich v. Mississippi &c. R. Co., 20 Iowa 338; Bucklew v. Central &c. R. Co., 64 Iowa 603, 21 N. W. 103; Chicago &c. R. Co. v. Pontius, 52 Kans. 264, 34 Pac. 739; International &c. R. Co. v. Still, 40 Tex. Civ. App. 22, 88 S. W. 257; Ditberner v. Chicago &c. R. Co., 47 Wis. 138, 2 N. W. 69. See also

states having constitutions prohibiting the enactment of local or special laws to support the decisions which adjudge valid statutes which apply only to railroad companies, since the singling out of one class of corporations appears very much as if it were special legislation. The reasoning by which the decisions are supported is that railroads are a peculiar class of corporations requiring legislation of a different character from that required by other corporations. It is also argued that such statutes meet "a particular necessity,"[8] and some cases of what seems to us an essentially different nature are adduced in support of the legislation.[9] There is some ground for affirming that the reasoning is not sound for the subject of the legislation is the relation of master and servant, and the law governing the contracts which create the relation ought, on principle, as we venture to say, to be the same as to all persons. The question, however, is settled so far as judicial decisions can settle it, and such statutes must be regarded as constitutional.[10] It is held in a Minnesota case that a statute apply-

Louisville &c. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. 676, 47 L. R. A. (N. S.) 84 and note; also notes in 12 L. R. A. (N. S.) 1040, 33 L. R. A. (N. S.) 706, and 38 L. R. A. (N. S.) 867. And it has recently been held that the equal protection of the laws is not denied by construing the proviso in the Minnesota statute as only exempting incomplete railroads. Minnesota Iron Co. v. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. ed. 322. Statutes limited to establishments or masters employing five or more employes, and the like, have also been upheld in many cases. Chicago &c. R. Co. v. Mitchell, 184 Ind. 588, 110 N. E. 680; Vandalia R. Co. v. Stillwell, 181 Ind. 267, Ann. Cas. 1916D, 868, 104 N. E. 289, affirmed by Supreme Court of United States. See also Vivian Collieries Co. v. Cahill, 184 Ind. 473, 110 N. E. 672; Doan v. E. C. Atkins Co., 184 Ind. 678, 111 N. E. 312; American C. &c. Co. v. Williams, 63 Ind. App. 1, 113 N. E. 252; Standard &c. Co. v. Martinecz (Ind. App.), 113 N. E. 244.

[8] Missouri Pacific R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107.

[9] Missouri Pacific R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 857, 28 L. ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. ed. 1145.

[10] The cases which deny the power to limit the right to contract in cases of particular corporations seem to us to oppose the doctrine of the cases to which we have referred, and so to other cases. State

ing only to railroad companies, in order to be constitutional, must be confined to the "peculiar hazards incident to the use and operation of railroads."[11] There is considerable force in the reasoning of the court in the case referred to, but the majority of the cases widely depart from the doctrine of the case under immediate mention.[12]

v. Tolle, 71 Mo. 645; Sharer v. Pennsylvania Co., 71 Fed. 931; Smith v. Louisville &c. R. Co., 75 Ala. 449; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. 315; State v. Herrmann, 75 Mo. 340; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789 and note; State v. Julow, 129 Mo. 163, 31 S. W. 781; Jacobs, In re, 98 N. Y. 98, 50 Am. Rep. 636 and note; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465; Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. 863 and note. See cases cited, ante, § 779. See generally Commonwealth v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325 and note, 31 Am. St. 533; Willson v. Waterloo &c. Ry. Co., 182 Iowa 1299, 166 N. W. 579.

[11] Johnson v. St. Paul &c. R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419. In the case cited it was said: "It is sometimes loosely stated that special legislation is not class if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are in the same condition." See also Indianapolis Trac. Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711; Richey v. Cleveland &c. R. Co., 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121, and cases cited; Deppe v. Chicago &c. R. Co., 36 Iowa 52; Potter v. Chicago &c. R. Co., 46 Iowa 399; Chicago &c. R. Co. v. Pontius, 52 Kans. 264, 34 Pac. 739; Beleal v. Northern Pac. R. Co., 15 N. Dak. 318, 108 N. W. 33, 35, 11 Ann. Cas. 921.

[12] See Callahan v. St. Louis Merchants Bridge &c. R. Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. 746, affirmed in 194 U. S. 628, 24 Sup. Ct. 857, 48 L. ed. 1157; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. ed. 78, Ann. Cas. 1912A, 463, 32 L. R. A. (N. S.) 226; Louisville & N. R. Co. v. Melten, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. ed. 921, 47 L. R. A. (N. S.) 84 and note. In the last case cited, referring to the contention that the statute must be confined to hazards peculiar to the operation of railroads, in order to be constitutional as including railroads alone, and can not apply under such a classification to other risks, the court said: "In other words, reduced to its ultimate analysis the contention comes to this: that by the operation of the equal protection clause of the 14th Amendment, the states

§ 1927 (1336). **Invalid legislation.**—The legislatures of some of the states have enacted statutes so clearly in violation of the constitution that the courts have unhesitatingly overthrown them. Thus, a statute which makes it a criminal offense to employ an alien laborer has been held to be unconstitutional.[13] So, a statute which requires a corporation to furnish a discharged employe with a statement of the reasons for which he was discharged has been adjudged to violate the constitution and to be void.[14] It has been held that a statute which singles out a class of corporations and requires the employer to limit

are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class."

[13] People v. Warren, 13 Misc. 615, 34 N. Y. S. 942.

[14] Wallace v. Georgia &c. R. Co., 94 Ga. 732, 22 S. E. 579. But a statute making blacklisting an offense has been held constitutional and valid. Scheffer v. Justis, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. 550. And so has a statute prescribing a penalty for not paying an employe when discharged. St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. 154, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. ed. 746. In Crall v. Toledo &c. R. Co., 7 Ohio Cir. Ct. 132, 34 Am. L. Reg. & Rev. 635, it was held that the penalty provided by the statute could not be recovered by an employe, but no decision as to the validity of the statute was given.

a day's work to a specified number of hours is invalid.[15] In another case it was held that a statute which prohibited the employment of females by one class of employers was unconstitutional because it was a special law.[16] And in still another case a statute making it unlawful to employ as a conductor on a passenger train any person who had not had two years' experience within six years before the time of such employment as either a passenger or freight conductor, but excepting conductors already employed at the time of the passage of the act, was held unconstitutional.[17] In a Missouri case a statute making it unlawful for an employer to require an employe to withdraw from a labor organization was held to be unconstitutional.[18] In many other cases laws have been held void upon the ground that they violate the constitutional provisions protecting the right of contract, and are special laws within the prohibition of the constitution.[19] It has also been held that

[15] Eight-Hour Bill, In re, 21 Colo. 29, 39 Pac. 328; Low v. Rees Printing Co., 41 Nebr. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. 670; Wheeling &c. Co. v. Gilmore, 8 Ohio Cir. C. 658, 1 Ohio Dec. 390. See also People v. Orange &c. Co., 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33 and note. But compare Ten-Hour Law, Re, 24 R. I 603, 54 Atl. 602, 61 L. R. A. 612; Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148. Wenham v. State, 65 Nebr. 394, 91 N. W. 421, 58 L. R. A. 825; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 32 L. ed. 780; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133. But see post, chapter on Hours of Service Acts.

[16] Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454, 46 Am. St. 315, 27 Chicago Legal News, 270.

[17] Cleveland &c. R. Co. v. State, 26 Ohio Cir. Ct. 348, affirmed in State v. Cleveland &c. R. Co., 70 Ohio St. 506, 72 N. E. 1165.

[18] State v. Julow, 129 Mo. 163, 31 S. W. 781. In State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, is was held that a statute requiring screens to be put up for protection of motormen on street railways was valid, but that case is a type of a different class of cases from those referred to in the text. See State v. Hoskins, 60 Minn. 168, 59 N. W. 545, 27 L. R. A. 412.

[19] Ante. §§ 773, 779; Janes v. Reynolds, 2 Tex. 250; Wynehamer v. People, 13 N. Y. 378; Vanzant v. Vaddel, 2 Yerg. (Tenn.) 259; Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; Harding v. People, 160 Ill. 624, 43 N. E. 624. See also note in 65 L. R. A. 33; Street v. Varney &c. Co., 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 98 Am. St. 325 and note.

section four of the Indiana "Employers' Liability Act," providing that, in an action against a railroad company in Indiana for a personal injury inflicted in another state, it shall not be competent for the company to plead or prove the decisions or statute of such other state as a defense, is unconstitutional.[20]

§ 1928 (1337). **Construction of employers' liability statutes—Generally.**—Many of the cases give a very liberal construction to statutes enlarging the liability of employers, holding that, as in favor of employes, such statutes are remedial, and are to be liberally construed so as to advance the remedy.[21] But such statutes are in derogation of the common law, add duties and increase liabilities, so that it seems to us that, while the construction is not to be technically strict, there is no valid reason for construing them with the same liberality that statutes truly remedial are construed. Such statutes as those we are considering do not simply create new remedies, but, on the contrary, they create new rights and provide for new obligations which were unknown to the common law. It is going far enough, as we think, to say that such statutes shall be reasonably construed according to the ordinary canons of construction, and it is going too far to give them a liberal construction upon the theory that they are to be regarded as purely remedial statutes.[22] If a statute such as those we are dealing

[20] Baltimore &c. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. 293. And the act is also held unconstitutional in so far as it applies to other than railroads. See also generally Bedford Quarries Co. v. Baugh, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; American Car &c. Co. v. Inzer, 172 Ind. 58, 87 N. E. 722; Chicago &c. Ry. Co. v. Westby, 178 Fed. 619, 47 L. R. A. (N. S.) 97.

[21] Gibbs v. Great Western &c. R. Co., L. R. 12 Q. B. D. 208; Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667 and note; Coughlin v. Tow Boat Co., 151 Mass. 92, 23 N. E. 721; Clark v. Merchants' &c., 151 Mass. 352, 24 N. E. 49. See also Pratt v. Missouri Pac. R. Co., 139 Mo. App. 502, 122 S. W. 1125.

[22] In Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48, 10 L. R. A. 839, the court quoted the familiar statement that: "As a rule of exposition statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation further than the case ab-

with simply affected the remedy it would apply to pending cases, but certainly it will not be seriously insisted that they have any such effect, for to give them such an effect would be to add obligations not existing when the right of action accrued. Such statutes cannot have a retroactive operation, but can only operate prospectively.[23] If the relation of master and servant is created, it must, as it seems to us, be governed by the law in force at the time the relation is created, except where, after a change of the law, the relation is continued. We suppose that, if the relation continues after the enactment of a statute changing the obligations and liabilities of employers and employes, the rights of parties would be determined upon the rules of law prescribed by the statute as to accidents occurring subsequent to the enactment of the statute,[24] but as to accidents occurring prior to the enactment of the statutes the rights of the parties would be determined by the rules of the common law.

§ 1929 (1338). Construction of employers' liability acts—Definitions.—The courts have often been called upon to define

solutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly announced, for if the legislature had that design it is natural that they would have expressed it." The court cited the cases of Missouri &c. R. Co. v. Haley, 25 Kans. 35; Missouri Pac. R. Co. v. Mackey, 33 Kans. 298, 6 Pac. 291; Bucklew v. Central &c. R. Co., 64 Iowa 603, 21 N. W. 103; Kansas &c. R. Co. v. Fitzsimmons, 18 Kans. 34; St. Louis &c. R. Co. v. Willis, 38 Kans. 330, 16 Pac. 728. See also Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 14 Ann. Cas. 816; Reinke v. Northern Pac. R. Co., 145 Fed. 988; American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986; Cleveland &c. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594; Hughes v. Indiana Union Trac. Co., 57 Ind. App. 202, 105 N. E. 537; Slaats v. Chicago &c. R. Co., 149 Iowa 735, 129 N. W. 63, 47 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 642 n.

[23] See Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. 163; Western Coal &c. Co. v. Corkille, 96 Ark. 387, 131 S. W. 963; Wright v. Southern R. Co., 123 N. Car. 280, 31 S. E. 650; McHugh v. Jones &c. Steel Co., 219 Pa. St. 644, 69 Atl. 90; Winfree v. Northern Pac. R. Co., 227 U. S. 296, 33 Sup. Ct. 273, 57 L. ed. 518.

[24] See Pittsburg &c. Ry. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, 11 Ann. Cas. 879.

the meaning of terms employed by the legislature in statutes regulating the subject of employer and employe, and we shall in this section refer to some of the cases in which definitions are given, but shall do so briefly, for we have touched upon the subject in several other places. It has been held that a car attached to a trolley and propelled by steam over rails is not "a locomotive engine" within the meaning of the statute.[25] So, a pile driver, consisting of a steam engine placed on a flat car and a driver to raise a hammer, all consisting of one machine capable of self propulsion, is not a locomotive engine within the meaning of the statute.[26] A locomotive in a roundhouse, although resting on rails, but temporarily in the roundhouse for the purpose of being repaired, is not a locomotive "upon a railroad."[27] Cars connected in a train have been held

[25] Murphy v. Wilson, 52 L. J. (Q. B.) 524.

[26] Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057, 1059 (citing text). As said by the court, "by the term 'locomotive engine,' the legislature only intended an engine constructed and used for traction purposes on a railroad track." Willson v. Waterloo &c. Ry. Co., 182 Iowa 1299, 166 N. W. 579 (steam shovel on flat car); Lake Shore &c. R. Co. v. Benson, 85 Ohio St. 215, 97 N. E. 417, 41 L. R. A. (N. S.) 49, Ann. Cas. 1913A, 945 n. And an electric car is not a locomotive engine. Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145, 149. So, the term "engineer" has been held to apply only to an engineer of a locomotive engine, and not to an engineer of a stationary engine used in unloading gravel from flat cars. Reinke v. Northern Pac. R. Co., 145 Fed. 988. And such statutes are usually held not to apply to street railways. McLeod v. Chicago &c. R. Co., 125 Iowa 270, 101 N. W. 77; Lundquest v. Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006; McAdow v. Kansas City &c. R. Co., 192 Mo. App. 540, 164 S. W. 188; Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826; Omaha & C. B. St. Ry. Co. v. Interstate Com. Com., 230 U. S. 324, 33 Sup. Ct. 890, 57 L. ed. 1501, 46 L. R. A. (N. S.) 385; ante, § 1925, n. 3.

[27] Perry v. Old Colony R. Co., 164 Mass. 296, 41 N. E. 289. The court quoted from Thyng v. Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425, the following: "The statute seems chiefly to contemplate the damages from a locomotive engine or train as a moving body, and to provide against the negligence of those who in whole or in part control its movements." But compare Woodward Iron Co. v. Lewis, 171 Ala. 233, 54 So. 566; which is distinguished, however, in Woodward Iron Co. v. Hubbard, 201 Ala. 106, 77 So. 400, L. R. A. 1918C, 640.

to be machinery,[28] but this seems to us a questionable ruling. The term "ways and works," has been held not to embrace temporary structures.[29] But it has been held that staging used by workmen in the discharge of the duties of their service was part of the employer's "ways, works or machinery."[30] Foreign cars have been held to be part of employer's "ways, works or machinery" within the meaning of the statute.[31] The term "employer" means the person by whom the plaintiff was hired, although the hirer may make use of appliances owned by a third person. Thus, where a municipal corporation hired a railroad train and used it on a temporary track constructed on its own property, it was held to be engaged in operating a railroad, and that it was liable as the operator of a railroad to an employe who received an injury while riding on the train.[32]

[28] Georgia &c. R. Co. v. Brooks, 84 Ala. 138, 4 So. 289. See Seavly v. Central &c. Co., 111 Mass. 540.

[29] Burns v. Washburn, 160 Mass. 457, 36 N. E. 199; Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550, citing Howe v. Finch, 17 Q. B. D. 187, Willets v. Watt, L. R. (1892) 2 Q. B. 92; O'Connor v. Neal, 153 Mass. 281, 26 N. E. 857; May v. Whittier Machine Co., 154 Mass. 29, 27 N. E. 768; Regan v. Donovan, 159 Mass. 1, 33 N. E. 702, and denying Brannigan v. Robinson, L. R. (1892) 1 Q. B. 344. See also Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199; Nichols v. Boston &c. R. Co., 206 Mass. 463, 92 N. E. 711. But see contra, Cleveland &c. R. Co. v. Austin, 127 Ill. App. 281. Upon the question whether a defect is obvious the cases of Griffin v. Ohio &c. R. Co., 124 Ind. 326, 24 N. E. 888, and Swanson v. Lafayette, 134 Ind. 625, 33 N. E. 1033, were cited. Upon the question of negligence of superintendent, Connolly v. Waltham, 156 Mass. 368, 31 N. E. 302, and Willets v. Watt, were cited.

[30] Prendible v. Connecticut &c. Co., 160 Mass. 131, 35 N. E. 675. And see as to a derrick, McMahon v. McHale, 174 Mass. 320, 54 N. E. 854; McGlynn v. Penna. Steel Co., 144 App. Div. 343, 129 N. Y. S. 45; But compare Southern R. Co. v. Shook, 150 Ala. 361, 43 So. 579; Nappa v. Erie R. Co., 195 N. Y. 176, 88 N. E. 30, 21 L. R. A. (N. S.) 96.

[31] Bowers v. Connecticut &c. R. Co., 162 Mass. 312, 38 N. E. 508; citing Coffee v. New York &c. R. Co., 155 Mass. 21, 28 N. E. 1128; Fay v. Minneapolis &c. R. Co., 30 Minn. 231, 15 N. W. 241; Spaulding v. Flynt &c. Granite Co., 159 Mass. 587, 34 N. E. 1134; Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. 163.

[32] Johnson v. Boston, 118 Mass. 114; Clapp v. Kemp, 122 Mass. 481; Ward v. New England Fibre Co., 154 Mass. 419, 28 N. E. 299; Con-

A connecting track, used by the employer but owned by a different railroad company, is held not to be one of its "ways,"[33] and a like ruling was made as to a track owned by a shipper.[34] The term "a person who is in superintendence" has been defined to mean "a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labor."[35]

§ 1930 (1339). **The effect of the statute upon the contractual element in the relation of employer and employe.**—There is real difficulty in solving the question as to whether the provisions of the statute enter into the contract upon which the relation of employer and employe is based. If such statutes are to be regarded as simply inflicting penalties by way of punishment, then it is doubtless true that they do not enter into the contract, but if they are to be considered as providing new obli-

nolly v. Waltham, 156 Mass. 368, 31 N. E. 302; Hennessy v. Boston, 161 Mass. 502, 37 N. E. 668; Driscoll v. Fall River, 163 Mass. 105, 39 N. E. 1003; McCann v. Waltham, 163 Mass. 344, 40 N. E. 20. Coughlan v. Cambridge, 166 Mass. 268, 44 N. E. 218, citing Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. 267; Rourke v. Colliery Co., 2 C. P. Div. 205. See also Schoen v. Chicago &c. R. Co., 112 Minn. 38, 127 N. W. 433, 45 L. R. A. (N. S.) 841 n.; Lodwick Lumber Co. v. Taylor, 39 Tex. Civ. App. 302, 87 S. W. 358, 360 (citing text). But compare O'Neal v. South &c. R. Co., 152 N. Car. 404, 67 S. E. 1022.

[33] Trask v. Old Colony R. Co., 156 Mass. 298, 31 N. E. 6.

[34] Engel v. New York &c. R. Co., 160 Mass. 260, 35 N. E. 547, 22 L. R. A. 283 and note. In the case cited it was suggested that the owner of the track, the shipper, might be liable and the court referred to the case of Finnegan v. Gas Works Co., 158 Mass. 311, 34 N. E. 523; Osborne v. Morgan, 130 Mass. 102, 104, 39 Am. Rep. 437. For other cases illustrating the meaning of the terms "ways, works, machinery and plant," see Brouillette v. Connecticut &c. R. Co., 162 Mass. 198, 38 N. E. 507; Shea v. Wellington, 163 Mass. 364, 40 N. E. 173; note in 19 L. R. A. (N. S.) 738; Louisville &c. Co. v. Pearson, 97 Ala. 211, 12 So. 176. As to what is "repair work," under the Nebraska statute, see Swoboda v. Union Pac. R. Co., 87 Nebr. 207, 127 N. W. 215, 138 Am. St. 483; Union Pac. R. Co. v. Brenton, 218 Fed. 593.

[35] Kellard v. Rooke, L. R. 21 Q. B. D. 365. But see post, § 1945. See also Southern R. Co. v. Shook, 150 Ala. 361, 43 So. 579; Louisville &c. R. Co. v. Andrews, 171 Ala. 200, 54 So. 553; Laplaca v. Lake Shore &c. R. Co., 194 N. Y. 562, 87 N. E. 1121; Gallagher v. Newman, 190 N. Y. 444, 83 N. E. 480, 16 L.

gations, then, under familiar general rules, such provisions become factors in every contract creating the relation of master and servant. If such statutes simply prescribe penalties, by way of punishment, then, under well-settled rules, they can have no extraterritorial force, and yet it is very generally held that actions based upon the rights they create may be maintained in other states.[36] The federal courts have uniformly held that questions arising out of the relation of master and servant are questions of general law upon which the federal tribunals will not follow the state decisions if opposed to their convictions, but it is also held that where there is a state statute the federal courts will enforce it and adopt the construction given it by the state courts, although the rules it prescribes are opposed to the law as previously declared by those courts.[37] It is also held that the federal courts sitting in one state may enforce the right of an employe to recover damages given him by the statute of the state in which the accident occurred.[38] It is not easy to understand how these decisions can be sup-

R. A. (N. S.) 146 n.; Rippy v. Southern R. Co., 80 S. Car. 539, 61 S. E. 1010, 21 L. R. A. (N. S.) 601 n.

[36] In treating of the subject of the conflict of law we have referred to the authorities. See also Pensabene v. F. & J. Auditive Co., 78 Misc. 538, 138 N. Y. S. 947; Atchison, Topeka & S. F. R. Co. v. Sowers, 213 U. S. 55, 70, 29 Sup. Ct. 397, 53 L. ed. 695; Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. ed. 997, and post, §§ 2051-2053. It has also been held that the common-law fellow-servant rule at the place where the injury occurred governs, notwithstanding it has been changed by statute at the forum. Louisville &c. R. Co. v. Keier, 132 Ky. 419, 113 S. W. 433.

[37] Northern Pacific &c. R. Co. v. Hogan, 63 Fed. 102; Bucher v. Cheshire &c. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 795; Detroit v. Osborn, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. ed. 260; Griffin v. Overman &c., 61 Fed. 568. See also Fulton v. Wilmington &c. Co., 133 Fed. 193, 68 L. R. A. 168.

[38] Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829, citing Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439; and reviewing Willis v. Railroad Co., 61 Tex. 432, 48 Am. Rep. 301; Texas &c. R. Co. v. Richards, 68 Tex. 375, 4 S. W. 627; St. Louis &c. R. Co. v. McCormick, 71 Tex. 660, 9 S. W. 540; Turner v. Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262 and note; Texas &c. R. Co. v. Collins, 84 Tex. 121, 19 S. W. 365. See also Boston &c. R. Co. v. McDuffey, 79 Fed. 934.

ported, if the theory that employers' liability acts affect only the remedy or simply denounce penalties is correct. There is, we are persuaded, reason for affirming that the provisions of the statute do enter into the contract, but the decisions are probably against this view.[39] It does not follow, from an affirmance of the proposition that the statutory provisions enter into the contract, that the law of another state may not be of controlling influence; on the contrary, that law must, upon familiar principles, be the governing law so far as concerns the performance of the contract in the state where that law prevails.[40] If, for instance, a railroad company of Pennsylvania, extending through New York, requires the performances of duties in New York, the law of that state as to the performance of duties there is the law of the contract. It seems to us that the view we have outlined is the correct one, and that

[39] Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 38 Am. St. 163; Chicago &c. R. Co. v. Doyle, 60 Miss. 977, 984. See also Boston &c. R. Co. v. McDuffey, 79 Fed. 934; Pennsylvania Co. v. Fishback, 123 Fed. 465; Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900; Christian v. Columbus &c. Ry. Co., 79 Ga. 460; Davis v. New York &c. R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138. Compare Leezotte v. Boston &c. R. Co., 70 N. H. 5, 45 Atl. 1084; Turner v. St. Clair &c. Co., 121 Mich. 616, 80 N. W. 720, 47 L. R. A. 112. In Williams v. Southern Ry. Co., 128 N. Car. 286, 38 S. E. 893, it is said in such a case that although tort is alleged it is based on contract; and in Miller v. Southern Ry. Co., 141 N. Car. 45, 53 S. E. 726, the contract of employment being made in North Carolina, and it not appearing that the service was to be performed entirely outside the state, it was held that the provisions of the fellow-servant act of North Carolina should be read into the contract and would govern, although the injury was received in another state. See also Caldwell v. Seaboard Air Line Ry., 73 S. Car. 443, 53 S. E. 746; Cannady v. Atlantic &c. R. Co., 143 N. Car. 439, 55 S. E. 836, 8 L. R. A. (N. S.) 939, 118 Am. St. 821. See generally Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; East Tennessee &c. R. Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Herrick v. Minnesota &c. R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Chicago &c. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410, as to conflict of laws and enforcement employers' liability acts in other states.

[40] Whitford v. Panama &c. R. Co., 23 N. Y. 465; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1.

the decisions which hold that the statutes simply punish negligence are unsound.[41]

§ 1931 (1340). **Railroad companies owning lines partly within the state and partly within other states.**—It has been held that a statute applying in general terms to railroad companies applies to all railroad companies any part of whose lines extend into the state where the injury complained of was received, "within or without the state."[42] One of the judges dissented, and with much force argued that the statute did not apply to injuries occurring in another state. In the same case it was held that the provision of the statute making the existence of a defect prima facie evidence of negligence governed although the accident occurred in another state.[43]

§ 1932 (1341). **Railroads operated by receivers.**—There is conflict upon the question whether statutes defining the duties

[41] But on the theory of most of the decisions to the contrary, that the statutes are not final and that it is not because the state statute has extraterritorial force that a transitory action under it may be maintained in another jurisdiction but because it gives substantial rights which are vested under it and it is not the statute but such rights that are enforced in another jurisdiction, it may be that our criticism is not well founded. See Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 134, 11 So. 803, 18 L. R. A. 433, 38 Am. St. 163; Burns v. Grand Rapids &c. R. Co., 113 Ind. 169, 171, 15 N. E. 230; Young v. Boston &c. R. Co., 168 Mass. 219, 46 N. E. 624; Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 582, 583, 48 L. ed. 900.

[42] Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L. R. A. 651, 56 Am. St. 695. See also Peirce v. Van Dusen, 78 Fed. 693, 69 L. R. A. 705; Kansas City R. Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. 78. But compare Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372 n., 374; and other Massachusetts cases then cited to the effect that in the absence of unequivocal language it is not to be presumed that statutes are designed to control conduct or fix the rights of parties beyond the territorial limits of the state.

[43] In a number of cases it is held that the statute of another state concerning the presumption of negligence pertains to the remedy and has no extraterritorial force. Smith v. Wabash &c. R. Co., 141 Ind. 92, 4 N. E. 270; Johnson v. Chicago &c. R. Co., 91 Iowa 248, 59 N. W. 66; Knight v. Railroad Co., 108 Pa. St. 250, 56 Am. Rep. 200; Bridger v. Asheville &c. R. Co., 25 S. Car.

and liabilities of railroad companies to their employes apply to receivers operating railroads under order of court. There are cases directly affirming that they do,[44] but other cases positively assert that they do not.[45] We think that ordinarily such statutes do apply to receivers. A receiver to a great extent takes the corporate property and rights as it was held by the corporation, and hence takes it subject to the restrictions and burdens imposed by law. If he undertakes to operate the railroad he must do it upon the terms and conditions which the law prescribes, and the law as to the duty to employes operates upon him substantially as it did upon the railroad corporation to whose rights he succeeded.[46]

§ 1933 (1342). The relation of master and servant must exist.—In order to entitle an injured person to the benefit of an employers' liability act, the relation of employer and employe must exist at the time the injury is received.[47] The effect of some of the statutes is to almost entirely abrogate the

24, 3 S. E. 860. See infra, Conflict of Law. And see post, §§ 2051-2053.

[44] Hornsby v. Eddy, 56 Fed. 461; Rouse v. Hornsby, 67 Fed. 219; Peirce v. Van Dusen, 78 Fed. 693, 69 L. R. A. 705; Rouse v. Harvey, 55 Kans. 589, 40 Pac. 1007; Mikkleson v. Truesdale, 63 Minn. 137, 65 N. W. 260. See Little v. Dusenbury, 46 N. J. L. 614, 50 Am. Rep. 445; Hunt v. Conner, 26 Ind. App. 41, 59 N. E. 50; Sloan v. Central &c. R. Co., 62 Iowa 728, 16 N. W. 331, 11 Am. & Eng. R. Cas. 145; Paige v. Smith, 99 Mass. 395; Daniels v. Hart, 118 Mass. 543; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633. And compare McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362, with Hudkins v. Bush, 69 W. Va. 194, 71 S. E. 106, Ann. Cas. 1913A, 533 n., as to necessity of showing appointment and authority of receiver.

[45] Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878; Turner v. Cross &c., 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262 and note; Clyde v. Richmond &c. R. Co., 59 Fed. 394; Henderson v. Walker, 55 Ga. 481; Youngblood v. Corner, 97 Ga., 152, 23 S. E. 509. But by recent statute in Georgia receivers are included. Barry v. McGee, 100 Ga. 759, 28 S. E. 455. So they are expressly included under the Federal Employers' Liability Act.

[46] Ante, § 660.

[47] See Holmes v. Birmingham St. R. Co., 140 Ala. 208, 37 So. 338; Dane v. Chemical Co., 164 Mass. 453; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357, 364. But not, it seems, under the comprehensive

common-law rule exonerating the master from liability for the negligence of a fellow servant, but such statutes do not extend to persons not in the service of the employer, while the effect of other statutes is to abrogate the rule in the cases specified. It seems to us that the ordinary rules for the construction of statutes must apply to such legislative enactments as we are here considering, and that, when specific cases are enumerated, other cases are excluded.[48] It makes no difference in what capacity the servant is engaged, the master is liable for the negligence of a fellow servant in those states where it is so provided and there is not an enumeration of the cases in which the employer shall be liable for the negligence of his employes.[49] A person who is sent by a contractor to perform service with workmen in his employment is held to be an employe within the statute.[50] So it has been held that a minor is an employe, although his name is not on the pay-roll and his father receives his wages.[51] In another case it was held that a watchman who undertook to couple cars was an employe while engaged in that duty by direction of the conductor.[52] But whether the

provisions of some of the statutes making the company liable to any person. Chicago &c. R. Co. v. O'Brien, 132 Fed. 593.

[48] Dixon v. Western Union Telegraph Co., 68 Fed. 630; Hittinger v. Westford, 135 Mass. 258.

[49] Larson v. Illinois &c. R. Co., 81 Iowa 91, 58 N. W. 1076; Davie v. Cochrane &c. Co., 164 Mass. 453, 41 N. E. 678, citing Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Harkins v. Sugar Refining &c. Co., 122 Mass. 400; Morgan v. Sears, 159 Mass. 570, 35 N. E. 101; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58. See also Texas Southern Ry. Co. v. Pyle (Tex. Civ. App.), 83 S. W. 234, 236; Missouri &c. Ry. Co. v. Keaveney (Tex. Civ. App.), 80 S. W. 387; Texas Pac. R. Co. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. ed. 905.

[50] Wild v. Waygood, L. R. (1892) 1 Q. B. 783.

[51] Tennessee &c. R. Co. v. Hayes, 97 Ala. 586, 12 So. 98. And student firemen or brakemen are usually servants although they are not yet to receive wages. Alabama &c. R. Co. v. Burks, 148 Ala. 113, 41 So. 638; Huntzicker v. Illinois Cent. R. Co., 129 Fed. 548.

[52] Georgia &c. R. Co. v. Propst, 85 Ala. 203, 4 So. 711; Georgia &c. R. Co. v. Propst, 83 Ala. 518, 3 So. 764. See also Marks v. Railway Co., 146 N. Y. 181, 40 N. E. 782; Ringue v. Oregon &c. Co., 44 Ore. 407, 75 Pac. 703. But compare Langan v. Tyler, 114 Fed. 716; Geibel v. Elwell, 19 App. Div. 285, 46 N. Y. S. 76.

watchman was an employe or a mere volunteer, must, as we suppose, depend upon the authority of the contractor, for if the conductor had no authority to require the watchman to couple cars the watchman was not an employe. And a statute providing that railroad companies shall be liable to employes for the negligence of a fellow servant does not apply where the injured person is the servant of an independent contractor of a railroad company, and is injured by a fellow servant.[53] The employer is not liable where the acts of negligence which caused the injury to the employe were committed prior to the time the relation of employer and employe began.[54]

§ 1934 (1343). Care required by statute of employer respecting machinery and appliances.—The rule under the statute is, as at common law, that the employer must exercise reasonable care to provide safe, or reasonably safe, machinery and appliances, and to keep them in a safe, or reasonably safe condition for use.[55] The employer is not bound to procure the best machinery. The statute does not require that the employer should discard reasonably safe machinery and appliances in order to procure new improved machinery or appliances.

§ 1935 (1344). Who are within the statute.—It is obvious that general rules cannot be safely stated for determining who are and who are not within the statute, for the provisions of

[53] Avery v. Southern, 137 N. Car. 130, 49 S. E. 91. But see Jacobs v. Fuller &c. Co., 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833. See also Fitzpatrick v. Evans & Co. (1902), 1 K. B. (C. A.) 505; Wagner v. Boston El. R. Co., 188 Mass. 437, 74 N. E. 919; Arthur v. Texas &c. R. Co., 139 Fed. 127. See also as to when the statute does not apply, Kelly v. Union Trac. Co., 199 Pa. St. 322, 49 Atl. 70.

[54] O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St. 483, citing Killea v. Faxon, 125 Mass. 485; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. 348; Wilson v. Merry, L. R. 1 H. L. 326.

[55] O'Maley v. South Boston &c. Co., 158 Mass. 135, 32 N. E. 119, 47 L. R. A. 161 and note; Richmond &c. R. Co. v. Bivins, 103 Ala. 142, 15 So. 515; Wilson v. Louisville &c. R. Co., 85 Ala. 269, 4 So. 701. But see for cases under the safety-appliance act of congress, United States v. Chicago &c. R. Co., 149 Fed. 486; Johnson v. Southern Pac. Co., 196 U. S. 1,

the statutes vary so much that what would be true under one statute would not be so under other statutes. We cannot safely do much more than direct attention to the decisions of the courts. A brakeman injured by the negligence of an engineer in starting a train without giving a signal has been held entitled to recover, provided he, the brakeman, is not guilty of contributory negligence.[56] The Georgia courts hold that the statute of that state is not limited to any particular class of employes,[57] and that the statute is valid, but it seems to us that these courts go rather too far. In one of the reported cases it is held that a brakeman injured while shifting cars used by a steel company is not within a statute providing that an employe engaged in or about the roads, works, depots, or premises of a railroad company, assumes the risk of negligence by the employes of such company.[58] The ground upon which the decision was rested, shortly stated, is that the plaintiff was not on the premises of the railroad company. Where the work on which the employe is engaged is connected with the railroad only by irrelevant and immaterial circumstances, "the case," it is said, "is not within the statute."[59] It has been held that a section man unloading ties from a car is within the statute imposing a liability for the negligence of fellow serv-

25 Sup. Ct. 158, 49 L. ed. 363; Lyon v. Charleston &c. R. Co. (S. Car.), 56 S. E. 18.

[56] Kruse v. Chicago &c. R. Co., 82 Wis. 568, 52 N. W. 755. But compare Evans v. Railway, 70 Miss. 527, 12 So. 581; Lyon v. Charleston &c. R. Co. (S. Car.), 56 S. E. 18. See generally McKnight v. Chicago &c. R. Co., 44 Minn. 141, 46 N. W. 294. See Morgan v. London &c. Co., L. R. 12 Q. B. D. 201, 13 Q. B. D. 832, for a decision as to who is a workman within the meaning of the English statute. See also Jackson v. Hill & Co., L. R. 13 Q. B. D. 618.

[57] Thompson v. Central &c. R. Co., 54 Ga. 509; Georgia R. Co. v. Ivey, 73 Ga. 499; Georgia &c. R. Co. v. Goldwire, 56 Ga. 196.

[58] Spisak v. Baltimore &c. R. Co., 152 Pa. St. 281, 25 Atl. 497. The court cited and distinguished Kirby v. Pennsylvania R. Co., 76 Pa. St. 506; Ricard v. North Pennsylvania R. Co., 89 Pa. St. 193; Cummings v. Pittsburg &c. R. Co., 92 Pa. St. 82; Richter v. Pennsylvania Co., 104 Pa. St. 511; Baltimore &c. R. Co. v. Colvin, 118 Pa. St. 230, 12 Atl. 337; Christman v. Philadelphia &c. R. Co., 141 Pa. St. 604, 21 Atl. 738.

[59] Spisak v. Baltimore &c. R. Co., 152 Pa. St. 281, 25 Atl. 497; Rich-

ants,[60] and that an engineer standing between two tracks, waiting to take charge of his engine when it backed down, is within the Indiana statute.[61] And employes injured while riding to or from work have generally been held within such statutes.[62] The Canadian courts give rather a broader effect to the statutes than many of the American courts, and indicate that all persons rendering any service are within the statute.[62a]

§ 1936. Railroad hazards—When statute is confined to risks from operation of road.—It is held that the case of a section

ter v. Pennsylvania Co., 104 Pa. St. 511; Christman v. Philadelphia &c. R. Co., 141 Pa. St. 604, 21 Atl. 738.

[60] Atchison &c. R. Co. v. Brassfield, 51 Kans. 167, 32 Pac. 814. See also Missouri Pac. Ry. Co. v. Smith, 82 Kans. 248, 108 Pac. 76, 47 L. R. A. (N. S.) 113; Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366, 127 Ky. 291, 110 S. W. 233, 112 S. W. 618, affirmed in 218 U. S. 36, 30 Sup. Ct. 676, 54 L. ed. 921, 47 L. R. A. (N. S.) 84; Jackson v. Ayden Lumber Co., 158 N. Car. 317, 74 S. E. 350; Linch v. Great Northern R. Co., 152 Wis. 414, 140 N. W. 33; Meo v. Chicago &c. R. Co., 138 Wis. 340, 120 N. W. 344. But compare Missouri &c. R. Co. v. Medaris, 60 Kans. 151, 55 Pac. 875; Holtz v. Great Northern Ry. Co., 69 Minn. 524, 72 N. W. 805; Nylund v. Duluth &c. R. Co., 123 Minn. 249, 143 N. W. 739 (unloading from detached car); Texarkana &c. R. Co. v. Anderson, 102 Tex. 402, 118 S. W. 127; St. Louis &c. R. Co. v. McGee (Tex. Civ. App.), 141 S. W. 1054. See however, the following cases in Minnesota and Texas: Papkovich v. Oliver &c. Min. Co., 109 Minn. 294, 123 N. W. 824 (unloading from car in motion); Freeman v. Shaw, 59 Tex. Civ. App. 294, 126 S. W. 53.

[61] Pittsburg &c. R. Co. v. Lightheiser, 163 Ind. 247, 78 N. E. 1033.

[62] Schroeder v. Chicago &c. R. Co., 47 Iowa 375; Hider v. Minneapolis &c. R. Co., 115 Minn. 325, 132 N. W. 316 (on hand car); Moran v. Eastern R. Co., 48 Minn. 46, 50 N. W. 930; Missouri Pac. Ry. Co. v. Larussi, 155 Fed. 654, affd. in 161 Fed. 66. See also for cases holding inspectors, car repairers, and others working on or about cars within the statute. Mitchell v. Northern Pac. R. Co., 70 Fed. 15; Canon v. Chicago &c. R. Co., 101 Iowa 613, 70 N. W. 755; Peirce v. Central Iowa R. Co., 73 Iowa 140, 34 N. W. 783; Russell v. Chicago &c. R. Co., 160 Iowa 503, 141 N. W. 1077, Ann. Cas. 1915D, 278 n.; Jensen v. Omaha &c. R. Co., 115 Iowa 404, 88 N. W. 952; Peters v. St. Louis &c. R. Co., 150 Mo. App. 721, 131 S. W. 917, 160 Mo. 629, 140 S. W. 1197. But compare Smith v. Chicago &c. R. Co., 91 Wis. 503, 65 N. W. 183.

[62a] LeMay v. Canadian &c. R. Co., 17 Ont. App. 293, 44 Am. & Eng. R. Cas. 627.

man injured while engaged in loading a car with iron rails by the negligence of another section man in letting one of the rails fall is not within a statute giving a right of action to an employe for injuries from dangers peculiar to the operation of a railroad.[63] A wiper of engines is held to be within the Iowa statute, and it is also held that a wiper who is discharging the duties of another employe is not to be regarded as a volunteer.[64] A person employed by a railroad company to remove snow from its tracks is held to be within the provisions of a statute giving a right of action to employes who are engaged in the business of operating railroads, or, who are, by the nature of their employment, exposed to the hazards incident to moving trains.[65]

[63] Pearson v Chicago &c. R. Co., 47 Minn. 9, 49 N. W. 302, citing Lavallee v. St. Paul &c. R. Co., 40 Minn. 249, 41 N. W. 974; Johnson v. St. Paul &c. R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; Smith v. St. Paul &c. R. Co., 44 Minn. 17, 46 N. W. 149. But see Blomquest v. Great Northern R. Co., 65 Minn. 69, 67 N. W. 804; Larson v. Illinois Cent. R. Co., 91 Iowa 81, 58 N. W. 1076; Stebbins v. Crooked Creek R. Co., 116 Iowa 513, 90 N. W. 355; Akeson v. Chicago &c. R. Co., 106 Iowa 54, 75 N. W. 676; and ante, § 1935, n. 60. See also Jemming v. Great Northern Ry. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696. But compare Johnson v. Great Northern R. Co., 104 Minn. 444, 116 N. W. 936, 18 L. R. A. (N. S.) 477 n. In Tay v. Willmar &c. Ry. Co., 100 Minn. 131, 110 N. W. 433, a sectionman in the employ of the defendant, while engaged with his foreman in repairing a side track in its railway yard, which necessitated the taking out of an old rail and putting another in its place, was injured by the negligence of his foreman in releasing his hold upon a rail without warning and letting it fall upon him, and it was held upon a consideration of the facts stated in the opinion, that it was a question for the jury whether the plaintiff's employment involved an element of hazard peculiar to railroad business.

[64] Whalen v. Chicago &c. R. Co., 75 Iowa 563, 39 N. W. 894, 38 Am. & Eng. R. Cas. 141. In a note to the case cited in the Am. & Eng. R. Cas. (p. 143), the Iowa statute is copied. See also Jensen v. Omaha &c. R. Co., 115 Iowa 404, 88 N. W. 952. It seems to us that some of the statements of the opinion in the first case referred to upon the subject of the duty to volunteers are rather too broad In Cloyd v. Galveston &c. Ry. Co., 37 Tex. Civ. App. 506, 84 S. W. 408, an engine wiper and a roundhouse hostler temporarily engaged with the wiper in cleaning the engine were held to be fellow-servants.

[65] Smith v. Humeston &c. R. Co., 78 Iowa 583, 43 N. W. 545, 41 Am.

It is held, however, in several Iowa cases that an employe not engaged in duties connected with the movement of trains is not within the statute,[66] but there is confusion and conflict in the Iowa cases.[67] It has been held that a private detective in walking along the track, according to the directions of the company, is within the statute,[68] and it has also been held that a person working with a ditching machine transported on the cars of the company is an employe that the statute protects.[69] As appears from the Iowa and Minnesota decisions already referred to in this section, some of the courts construe the statute as applying only to risks or hazards from the operation of trains, even though there is no such express limitation in the statute; and decisions in a number of other states are to the same effect.[70] But most, if not all, of such decisions are

& Eng. R. Cas. 278; citing Deppe v. Chicago &c. R. Co., 36 Iowa 52; Malone v. Burlington &c. R. Co., 65 Iowa 417, 21 N. W. 756, 54 Am. Rep. 11, 17 Am. & Eng. R. Cas. 644; Luce v. Chicago &c. R. Co., 67 Iowa 75, 24 N. W. 600; Smith v. Burlington &c. R. Co., 59 Iowa 73, 6 Am. & Eng. R. Cas. 149; Stroble v. Chicago &c. R. Co., 70 Iowa 555, 13 N. W. 63, 59 Am. Rep. 456, 28 Am. & Eng. R. Cas. 510. But compare Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077.

[66] Potter v. Chicago &c. R. Co., 46 Iowa 399; Schroeder v. Chicago &c. R. Co., 41 Iowa 344; Smith v. Burlington &c. R. Co., 59 Iowa 73, 12 N. W. 763, 6 Am. & Eng. R. Cas. 149; Malone v. Burlington &c. R. Co., 61 Iowa 326, 16 N. W. 203, 47 Am. Rep. 813; Stroble v. Chicago &c. R. Co., 70 Iowa 555, 13 N. W. 63, 59 Am. Rep. 456; Dunn v. Chicago &c. R. Co., 130 Iowa 580, 107 N. W. 616. The Iowa cases are reviewed in the principal and dissenting opinions in this case.

[67] Haden v. Sioux City &c. R. Co., 92 Iowa 226, 60 N. W. 537; Williams v. Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774; Butler v. Chicago &c. R. Co., 87 Iowa 206, 54 N. W. 208; post § 1949.

[68] Pyne v. Chicago &c. R. Co., 54 Iowa 223, 37 Am. Rep. 198.

[69] Nelson v. Chicago &c. R. Co., 73 Iowa 576, 35 N. W. 611. See generally the Iowa cases cited in note to this section, and also post, § 1949. But compare Reddington v. Chicago &c. R. Co., 108 Iowa 96, 78 N. W. 800; Johnson v. Great Northern Ry. Co., 104 Minn. 441, 116 N. W. 936, 18 L. R. A. (N. S.) 477.

[70] Cleveland &c. R. Co. v. Foland, 174 Ind. 411, 417, 91 N. E. 594, 92 N. E. 165 (member of bridge gang injured by falling piles); Richey v. Cleveland &c. R. Co., 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121, and cases cited (hand car); Indianapolis

based largely upon the proposition that such a construction is necessary in order to uphold the statute as constitutional, whereas, as already shown in another section,[71] the Supreme Court of the United States and other courts have held that such a statute may be valid and constitutional even though it is not so limited or construed.

§ 1937. Statutes held to cover hazards other than from operation of trains.—Even in jurisdictions in which it is held that the hazard must be peculiar to railroad operation, such as the movement of trains or the like, it is generally conceded that the employment of the injured servant is not required to be directly in the movement of trains and that it is sufficient if, in the performance of his duties, he is exposed to the perils and hazards of such movement or operation and injured thereby.[72] And in many cases the statutes have been held constitutional and applicable where the employment was not to engage in moving cars and the injury was not caused by a moving car.[73] Thus, such statutes have been held to include cases in

Trac. &c. Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711; Slaats v. Chicago &c. R. Co., 149 Iowa 735, 129 N. W. 63, 47 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 642n; Givens v. Southern R. Co., 94 Miss. 830, 49 So. 180, 22 L. R. A. (N. S.) 971 (hand car); Beleal v. Northern Pac. R. Co., 15 N. Dak. 318, 108 N. W. 33, 11 Ann. Cas. 921.

[71] Ante § 1926.

[72] Williams v. Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774; Johnson v. Great Northern R. Co., 104 Minn. 444, 116 N. W. 936, 18 L. R. A. (N. S.) 477; Mobile &c. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 124 Am. St. 679; Rice v. Wabash R. Co., 92 Mo. App. 35. See also as to exception in Minnesota under the "rule of haste." Christiansen v. Chicago &c. R. Co., 107 Minn. 341, 120 N. W. 300; Hanson v. Northern Pac. R. Co., 108 Minn. 94, 121 N. W. 607, 22 L. R. A. (N. S.) 968; Janssen v. Great Northern R. Co., 109 Minn. 285, 123 N. W. 664.

[73] Boggs v. Alabama &c. Co., 167 Ala. 251, 52 So. 878, 140 Am. St. 28; Chicago K. & W. R. Co. v. Pontius, 52 Kans. 264, 34 Pac. 739, affirmed in 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675; Atchison &c. R. Co. v. Vincent, 56 Kans. 344, 43 Pac. 251, 252; Mobile &c. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360; Mobile &c. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31 Sup. Ct. 136, Ann. Cas. 1912A, 463, 32 L. R. A. (N. S.) 226; Madden v. Missouri Pac. R. Co., 167 Mo. App. 143, 151 S. W. 489; Callaghan v. St. Louis &c.

which the work consisted in loading or unloading cars,[74] bridge or track repair,[75] and construction work generally,[76] although as to all of these there is some conflict of authority, especially as to construction work.[77] So, in most jurisdictions, employes injured while at work with a hand car are held to be within the statute.[78]

Terminal R. Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. 746, affirmed in 194 U. S. 628, 24 Sup. Ct. 857, 48 L. ed. 1157; St. Louis &c. R. Co. v. Cox, 31 Okla. 444, 122 Pac 130; St. Louis &c. R. Co. v. Jenkins (Tex. Civ. App.), 137 S. W. 579; Kiley v. Chicago &c. R. Co., 142 Wis. 154, 125 N. W. 464 (fence builder entitled to recover for injury to eye by flying staple); Chicago &c. R. Co. v. Stahley, 62 Fed. 363, and authorities cited in following notes.

[74] Ante, § 1935, n. 60 and § 2743. See also Daley v. Boston &c. R. Co., 147 Mass. 101, 16 N. E. 690; St. Louis &c. Ry. Co. v. Thornton, 46 Tex. Civ. App. 649, 103 S. W. 437.

[75] Missouri Pac. Ry. Co. v. Smith, 82 Kans. 248, 108 Pac. 76, 47 L. R. A. (N. S.) 113; Union Pac. R. Co. v. Harris, 33 Kans. 416, 6 Pac. 571; Stubbs v. Omaha &c. R. Co., 85 Mo. App. 192; Houston &c. R. Co. v. Bright (Tex. Civ. App.), 156 S. W. 304.

[76] Louisville & N. R. Co. v. Melton, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618, affd. in 218 U. S. 36, 30 Sup. Ct. 676, 54 L. ed. 921, 47 L. R. A. (N. S.) 84; Huston v. Quincy &c. R. Co., 129 Mo. App. 576, 107 S. W. 1045; Chesapeake &c. R. Co. v. Hoffman, 109 Va. 44, 63 S. E. 432. See also Gibler v. Quincy &c. R. Co., 148 Mo. App. 475, 128 S. W. 791; Voris v. Chicago &c. R. Co., 172 Mo. App. 125, 157 S. W. 835.

[77] Cleveland &c. R. Co. v. Foland, 174 Ind. 411, 417, 91 N. E. 594, 92 N. E. 165; O'Neil v. Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532 n.; Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647; Depuy v. Chicago &c. R. Co., 110 Mo. App. 110, 84 S. W. 103; O'Neal v. South &c. R. Co., 152 N. Car. 404, 67 S. E. 1022.

[78] Chicago, Mil. & St. P. R. Co. v. Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. ed. 747; Cahill v. Illinois Cent. R. Co., 148 Iowa 241, 125 N. W. 331, 28 L. R. A. (N. S.) 1121; Hider v. Minneapolis &c. R. Co., 115 Minn. 325, 132 N. W. 316; Overton v. Chicago &c. R. Co., 111 Mo. App. 613, 86 S. W. 503; Rice v. Wabash R. Co., 92 Mo. App. 35; Missouri &c. R. Co. v. Bailey, 53 Tex. Civ. App. 295, 115 S. W. 601; Texarkana &c. R. Co. v. Anderson (Tex. Civ. App.), 111 S. W. 173, and other Texas cases cited; Hardt v. Chicago &c. R. Co., 130 Wis. 512, 110 N. W. 427. Contra Vandalia R. Co. v. Parker, 178 Ind. 138, 98 N. E. 705; Richey v. Cleveland &c. R. Co., 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121; Givens v. Southern R. Co., 94 Miss. 830, 49 So. 180, 22 L. R. A. (N. S.) 971.

§ 1938 (1345). Assumption of risks—Effect of the statute.—The courts generally hold that the common-law doctrine of the assumption of risks is, in some respects, but not in all materially changed by the statutes enlarging the liabilities of employers. There can, of course, be no doubt that, to a very great extent, the common-law doctrine that employes assume the risk of injuries from the negligence of fellow servants is essentially changed, although not in all the states entirely abrogated. Where the statute enumerates the cases in which the master shall be liable for the negligence of co-employes, the common law rule must, as we believe, still prevail as to the cases not enumerated. Some of the courts hold that the employe does not assume the risk from a breach of duty expressly enjoined by statute.[79] In our opinion both principle and au-

[79] Mobile &c. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146; Highland Ave. R. Co. v. Walters, 91 Ala. 435, 8 So. 357; Baddely v. Earl Granville, L. R. 19 Q. B. D. 423; Yarmouth v. France, L. R. 19 Q. B. D. 647; Thomas v. Quartermaine, L. R. 18 Q. B. D. 685; Weblen v. Ballard, L. R. 17 Q. B. D. 122. In Pittsburg &c. Ry. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, 1037. 11 Ann. Cas. 879, it is said in regard to the clause of the statute making any person in the service of the company who has charge of any signal, telegraph office, switch-yard, roundhouse, locomotive engine or train on a railway in effect a vice-principal that: "It is clear that the doctrine of assumed risk is not applicable to an action brought, like this, under the part of said fourth subdivision above quoted. To hold otherwise would low-servant rule, which the statute establish in its full vigor the fel- was intended to abrogate as to the employes mentioned. American Rolling Mills Co. v. Hullinger, 161 Ind. 673, 679, 680, 67 N. E. 986, 69 N. E. 460; Davis v. New York &c. R. Co., 159 Mass. 532, 536, 34 N. E. 1070; Murphy v. City Coal Co., 172 Mass. 324, 52 N. E. 503; Woodward Iron Co. v. Andrews, 114 Ala. 243, 21 So. 440; Southern R. Co. v. Johnson, 114 Ga. 329, 40 S. E. 235; St. Louis R. Co. v. Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. 109. The later Alabama cases hold a doctrine essentially different from that asserted in the earlier cases (Birmingham R. Co. v. Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457), and the cases of Mobile &c. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146; Highland Ave. R. Co. v. Walters, 91 Ala. 435, 8 So. 357, are overruled. The English cases are reviewed in Birmingham &c. R. Co. v. Allen, and it is said that they go no further than to adjudge that mere knowledge of defects is not itself sufficient to defeat a recovery, but the knowledge may be such as to establish contributory negligence.

thority require the conclusion that an employe who knows of defects and is aware of the danger from them, and voluntarily continues in the service and makes no complaint, is not entitled to recover,[80] at least unless a governing statute either expressly or impliedly takes away the defense of assumption of risks in this respect.[81] The safety of passengers and employes makes

[80] Louisville &c. R. Co. v. Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. 863; East Tennessee &c. R. Co. v. Turaville, 97 Ala. 122, 12 So. 63; Louisville &c. R. Co. v. Banks, 104 Ala. 508, 16 So. 547; Louisville &c. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. 127; Pingree v. Leyland, 135 Mass. 398; Moulton v. Gage, 138 Mass. 390; Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667 and note; Mellor v. Merchants' &c. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792 and note; Lothrop v. Fitchburg &c. R. Co., 150 Mass. 423, 23 N. E. 227; Boyle v. New York &c. R. Co., 151 Mass. 102, 23 N. E. 827; Malcolm v. Fuller, 152 Mass. 160, 25 N. E. 83; O'Maley v. South Boston &c. Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161 and note; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396; Gleason v. New York &c. R. Co., 159 Mass. 68, 34 N. E. 79; Lynch v. Boston &c. R. Co., 159 Mass. 536, 34 N. E. 1072; Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554, 36 N. E. 486; Sullivan v. Fitchburg R. Co., 161 Mass. 125, 36 N. E. 751; Goddard v. McIntosh, 161 Mass. 253, 37 N. E. 169; Watts v. Boston Towboat Co., 161 Mass. 378, 37 N. E. 197; Connelly v. Hamilton &c. Co., 163 Mass. 156, 39 N. E. 787; Cassady v. Boston &c. R. Co., 164 Mass. 168, 41 N. E. 129; Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112; Larkin v. New York &c. R. Co., 166 Mass. 110, 44 N. E. 122; Yarmouth v. France, 19 Q. B. D. 647. In Cassaday v. Boston &c. R. Co., 164 Mass. 198, 41 N. E. 129, it was said: "On the question whether the plaintiff took the risk there is no difference whether the action is brought at common law or under the statute." The following cases and authorities were cited: Fisk v. Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510; Daigle v. Lawrence Manufacturing Co., 159 Mass. 378, 34 N. E. 458; Kleineist v. Kunhardt, 160 Mass. 230, 35 N. E. 458. See also Walling v. Terre Haute &c. R. Co., 60 Ind. App. 607, 111 N. E. 198; Kommerstad v. Great Northern R. Co., 120 Minn. 376, 139 N. W. 713; Johnson v. Northern Pac. R. Co., 125 Minn. 29, 145 N. W. 628.

[81] Many statutes, such as the factory act, coal mining acts, and some railroad acts, setting up a definite standard and requiring specific measures, are regarded in probably a majority of recent decisions as fixing the policy of the law and implicitly, if not expressly, abolishing the defence of assumption of risks from their violation, because, whether founded on contract or the doctrine volenti non fit injuria that defence must give way in order to make the statute effective and carry out the public

it the duty of railroad employes to make reasonable complaint where they have full knowledge of defects and possess the means and opportunity of complaining to their employer. It is impossible to state in general terms just to what extent the doctrine of assumption of risk still applies under the various statutes, as many of them differ materially in their provisions; but it would seem that under most of the employers' liability acts, which do not point out definitely just what the master must do, the common-law doctrine of assumption of risk still applies, except in so far as the particular statute in question may contain provisions inconsistent therewith.[82] But to apply the doctrine so as to make an employe assume the risk of negligence

policy. Narramore v. Cleveland &c. R. Co., 96 Fed. 298, 48 L. R. A. 68 (a leading case on this side of the question); St. Louis &c. R. Co. v. White, 93 Ark. 368, 125 S. W. 120; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; Chicago &c. R. Co. v. Mitchell, 184 Ind. 678, 111 N. E. 312; Chicago &c. R. Co. v. Lawrence, 169 Ind. 319, 79 N. E. 363; Cleveland &c. R. Co. v. Powers, 173 Ind. 105, 88 N. E. 107, 89 N. E. 845; Chicago &c. R. Co. v. Webb, 64 Ind. App. 673, 113 N. E. 748; Poli v. Numa Block Coal Co., 49 Iowa 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646, and note citing cases on both sides; Rivers v. Bay City Trac. &c. Co., 164 Mich. 696, 128 N. W. 254; Fitzwater v. Warren, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229, and note reviewing many other cases on both sides; Custer &c. Co. v. Pribyl, 38 Okla. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 491, and note reviewing recent cases on both sides; Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. 887; White's Supp. to Thomp. Neg. § 4621. Contra Denver &c. R. Co. v. Norgate, 141 Fed. 247, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448, and note (both the opinion and note reviewing many cases on each side of the question and citing § 1882 ante); St. Louis Cordage Co. v. Miller, 126 Fed. 495, 63 L. R. A. 551; Kommerstad v. Great Northern R. Co., 120 Minn. 376, 139 N. W. 713; Osterholn v. Boston &c. Min. Co., 40 Mont. 508, 107 Pac. 499; and cases cited in last preceding note 80. See also Yazoo &c. R. Co. v. Woodruff, 98 Miss. 36, 53 So. 687.

[82] American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986. See also Whitcomb v. Standard Oil Co., 153 Ind. 513, 55 N. E. 440; Pittsburg &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638. The distinction between employers' liability acts not prescribing specific duties or fixed standards and statutes such as those referred to in the last preceding note is also referred to in

of all those deemed fellow servants, as to whom the doctrine applied at common law, would be to emasculate the statute and defeat the very purpose of such statutes.[83]

§ 1939 (1346). **Who are fellow servants under employers' liability acts.**—It is not possible to lay down general rules which will apply to all cases for the reason that there is a difference in the language of the various statutes, and for the additional reason that there is a diversity of opinion. We shall, therefore, refer to the adjudged cases without special comment, and shall not undertake to formulate general rules. In one of the cases it is held that, under a statute providing that "all persons who are engaged in the common service of railway corporations, working together at the same time and place, are fellow servants," a station agent is not the fellow servant of trainmen.[84] Under the same statute it has been held that a hostler, whose duty it was to bring engines into a roundhouse and take them out when required, was the fellow servant of a boiler washer whose duty it was to clean out the boiler.[85] A wiper in a roundhouse has been held not to be a fellow servant with an

Cleveland &c. R. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485, 20 Ann. Cas. 1180.

[83] See last note to section 1950. See also Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Baggneski v. Mills, 193 Mass. 103, 78 N. E. 852; Murphy v. City Coal Co., 172 Mass. 324, 52 N. E. 503; Briscoe v. Chicago &c. R. Co., 130 Mo. App. 513, 109 S. W. 93. Some of the statutes expressly, or by necessary implication, do away with the doctrine of assumption of risks in cases within such statutes, and others modify it to a greater or less degree. As to abolishment or change of doctrine of assumption of risks under various statutes, see Chicago &c. R. Co. v. Mitchell, 184 Ind. 588, 110 N. E. 680; Defenbaugh v. Union Pac. R. Co., 102 Kans. 569, 171 Pac. 647; Stool v. Southern Pac. Co., 88 Ore. 350, 172 Pac. 101; Swann v. Texas &c. Ry. Co. (Tex. Civ. App.), 200 S. W. 1131.

[84] Gulf &c. R. Co. v. Calvert, 1 Tex. Civ. App. 297, 32 S. W. 246.

[85] Missouri &c. R. Co. v. Whitaker, 11 Tex. Civ. App. 668, 33 S. W. 716. So an assistant foreman of a bridge gang has been held not to be a vice-principal under the statute where he works with the men under the direction of the foreman. Missouri &c. R. Co. v. Day, 104 Tex. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

employe engaged in unloading gravel,[86] and a wiper in a roundhouse has been held to be entitled to recover for injuries caused by the negligence of other employes.[87] Negligence of a brakeman has been held to make the company liable to a yard workman.[88] It is held that a foreman, with authority to hire and discharge employes, although a vice-principal, is a co-employe with the men who work under him within the meaning of the Iowa statute and entitled to recover under it. Under the Ohio statute an engineer in charge of an engine is not a co-employe of a brakeman of another train, but he is a superior of the fireman of the locomotive.[90] In Mississippi and South Carolina, however, it is held that an engineer is not a superior, or person having the right to direct or control a brakeman or flagman who is acting under a conductor, within the meaning of the constitution.[91] A person employed to carry water for workmen engaged in operating a train has been held to be within the

[86] Nichols v. Chicago &c. R. Co., 60 Minn. 319, 62 N. W. 386.

[87] Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675. See Chicago &c. R. Co. v. Stahley, 62 Fed. 363.

[88] Promer v. Milwaukee &c. R. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. 905.

[89] Houser v. Chicago &c. R. Co., 60 Iowa 230, 14 N. W. 778, 46 Am. Rep. 65. But see Chicago &c. R. Co. v. Rathneau, 225 Ill. 278, 80 N. E. 119.

[90] Cincinnati &c. R. Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11. See also under Arkansas statute, St. Louis &c. R. Co. v. Ramsey, 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383n. And a conductor and car inspector are not fellow servants. St. Louis &c. R. Co. v. Lewis, 91 Ark. 343, 121 S. W. 268.

[91] Evans v. Railway, 70 Miss. 527, 12 So. 581 (but compare Yazoo &c. R. Co. v. Washington, 92 Miss. 129, 45 So. 614); Lyon v. Charleston &c. R. (S. Car.), 56 S. E. 18. It is also held in the South Carolina case that where failure of the company to have cars in a train equipped with air brakes operated from the engine, as required by the act of Congress, was not a proximate cause of the servant's injury, he can not rely thereon as actionable negligence, and that before he can be held not to have assumed risks of his employment, which he would not reasonably expect to encounter because not within the scope of his contract of hiring, it must be shown that he was transferred to essentially new duties, and that the order under which he acted was negligent. Distinguishing Carson v. Southern R. Co., 68 S. Car. 55, 68, 46 S. E. 525.

protection of the statute.[92] Various rulings under the statutes of other states will be found in the cases cited below.[93] The fellow-servant rule is not, as elsewhere shown, entirely abrogated, at least under most of the statutes, so that employes may still be co-employes and governed by the common-law rule.[94]

[92] Missouri &c. R. Co. v. Haley, 25 Kans. 35, 5 Am. & Eng. R. 594. See also Keatley v. Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560; Metz v. Chicago &c. R. Co., 88 Nebr. 459, 129 N. W. 994. For other cases under the Kansas statute see Union &c. R. Co. v. Thomason, 25 Kans. 1, 5 Am. & Eng. R. Cas. 589; Atchison &c. R. Co. v. Koehler, 37 Kans. 463, 15 Pac. 463, 31 Am. & Eng. R. Cas. 312; Smith v. Missouri Pac. R. Co., 82 Kans. 248, 108 Pac. 76, 47 L. R. A. (N. S.) 113 n. (section hand engaged in track repairing is within protection of statute).

[93] Knitter v. Chicago &c. R. Co., 179 Fed. 494 (Wisconsin statute abrogates fellow servant doctrine only in case of injury to railroad employe while engaged in line of duty as such); Alabama Steel Co. v. Griffin, 149 Ala. 423, 42 So. 1034 (statute relates only to those employed in and about a railroad); Birmingham R. &c. Co. v. Mosely, 164 Ala. 111, 51 So. 424 (but it applies to electric street railways); Still v. San Francisco &c. R. Co., 154 Cal. 559, 98 Pac. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. 177 (railroad company liable under the statute for death of a fireman caused by incompetency of conductor on another train); Patton v. Los Angeles Pac. R. Co., 18 Cal. App. 522, 123 Pac. 613 (statute applies to employes on interurban cars); Atkinson v. Swords, 11 Ga. App. 167, 74 S. E. 1093 (statute may be invoked against federal receiver); Dunn v. Chicago &c. R. Co., 130 Iowa 580, 107 N. W. 616, 6 L. R. A. (N. S.) 452, 8 Ann. Cas. 226; Slaats v. Chicago &c. R. Co., 149 Iowa 735, 129 N. W. 63, 47 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 642 n.; Tabor v. St. Louis &c. R. Co., 210 Mo. 385, 109 S. W. 764, 124 Am. St. 728; Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 S. W. 79; Orendorf v. Terminal R. Assn., 116 Mo. App. 348, 92 S. W. 148; Turner v. Terminal R. Assn., 132 Mo. App. 38, 111 S. W. 841; Moyse v. Northern Pac. R. Co., 41 Mont. 272, 108 Pac. 1062; St. Louis &c. R. Co. v. Cox, 31 Okla. 444, 122 Pac. 130; Bussey v. Charleston &c. R. Co., 78 S. Car. 352, 58 S. E. 1015; Whisonant v. Atlanta &c. R. Co., 86 S. Car. 300, 68 S. E. 566; Neesley v. Southern Pac. R. Co., 35 Utah 259, 99 Pac. 1067; Meyers v. San Pedro &c. R. Co., 36 Utah 307, 104 Pac. 736, 21 Ann. Cas. 1229; Southern R. Co. v. Smith, 107 Va. 553, 59 S. E. 372; Chesapeake &c. R. Co. v. Hoffman, 109 Va. 44, 63 S. E. 432; Washington &c. R. Co. v. Cheshire, 109 Va. 741, 65 S. E. 27; Jones v. Milwaukee Elec. R. &c. Co., 147 Wis. 427, 133 N. W. 638 (statute does not include electric railroad).

[94] McMaster v. Illinois Central R. Co., 65 Miss. 264, 4 So. 59, 7

§ 1940 (1347). Defects in appliances or machinery—What are within meaning of the statute.—Many of the statutes make the employer liable for defects in machinery and appliances, and the question as to what is a defect within the meaning of the statute has arisen in some of the cases. It is held that, although machinery is perfect of its kind and in good repair, if it is unsuitable for the purpose for which employes were required to use it there is a defect within the meaning of the statute.[95] It has been held that where the draw-bar of an engine is placed too low there is a defect.[96] Temporary obstructions, as a stone on a scaffold, are generally held not to be defects in "ways, works or machinery."[97] So, it has been held that a steel bar, which is not connected with any mechanical appliance, and which is operated by muscular strength directly applied, is not machinery within the meaning of the statute.[98] And similar decisions have been made as to hammers.[99] In some instances it has been held that whether a defect exists within the meaning of the statute is a question of fact for the jury.[1]

§ 1941 (1348). Latent defects—Rule under the statute.—The rule in regard to the employer's liability for latent defects is substantially the same under most of the statutes as at common law. If the hidden defect is one not discoverable by reasonable care in performing the duty of inspection, the employer is not

Am. St. 653; Chicago &c. R. Co. v. Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

[95] Geloneck v. Dean &c. Co., 165 Mass. 202, 43 N. E. 85. The court said that: "An unsuitableness of ways, works or machinery for work intended to be done and actually done by means of them is a defect, within the meaning of the statute."

[96] Lawless v. Connecticut &c. R. Co., 136 Mass. 1; Bowers v. Connecticut River &c. R. Co., 162 Mass. 312, 38 N. E. 508.

[97] Carroll v. Willcutt, 163 Mass. 221, 39 N. E. 1016; citing Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550; Burns v. Washburn, 160 Mass. 457, 36 N. E. 199; Prendible v. Connecticut Manufacturing Co., 160 Mass. 131, 35 N. E. 675. See ante, § 1929; McGiffin v. Palmer &c. Co., L. R. 10 Q. B. D. 5.

[98] Clements v. Alabama &c. R. Co., 127 Ala. 166, 28 So. 643.

[99] Georgia &c. R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. 308; Georgia Pac. R. Co. v. Brooks, 84 Ala. 138, 4 So. 289.

[1] Graham v. Boston &c. R. Co., 156 Mass. 4, 30 N. E. 359; Birmingham &c. Co. v. Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457.

liable.[2] If, however, there is a duty to inspect, and that duty is not performed, the employer is liable, if the defect is such as a reasonably careful inspection would have disclosed.

§ 1942 (1349). Rule where the defect is not attributable to the negligence of the employer.—The common law, as we have seen, did not hold an employer liable for an injury to an employe resulting from a defect in machinery or appliances unless there was negligence on the part of the employer. As this was the settled rule of the common law, and as the legislature is held to adopt statutes in view of the common-law rules, we think it clear that the mere existence of a defect is not sufficient to charge the employer, except, perhaps, where the statute clearly provides otherwise. Silence upon the subject will not, in our judgment, exclude the rule of the common law, but, of course, an express statutory provision would do so.[3] The common-law rule that the defect must be the proximate cause of the injury is enforced,[4] and in other instances reference is made to the common law so that the conclusion that the common-law rule that the mere existence of a defect without evidence of negligence on the part of the employer is not enough to charge the employer is not excluded except where the statute makes the existence of the defect sufficient prima facie evidence of

[2] See Coffee v. New York &c. R. Co., 155 Mass. 21, 28 N. E. 1128; Ladd v. New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331; Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574. See also Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 190, 40 So. 24.

[3] Walsh v. Whiteley, L. R. 21 Q. B. D. 371; Wilson v. Louisville &c. R. Co., 85 Ala. 269, 4 So. 625; Seaboard &c. R. Co. v. Woodson, 94 Ala. 143, 10 So. 87; United States &c. Co. v. Weir, 96 Ala. 396, 11 So. 436. The cases to which we have referred are based on special statutory provisions but they show the full recognition given the common law rules. See also New York &c. R. Co. v. Allen, 62 Ind. App. 391, 113 N. E. 315. Where the statute imposes an absolute and unqualified duty to do a certain thing the question of negligence is not the criterion of liability. Minneapolis &c. St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. ed. 995; Louisville &c. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. ed. 931.

[4] Brady v. Ludlow &c. Co., 154 Mass. 468, 28 N. E. 901; Louisville &c. R. Co. v. Binion, 98 Ala. 570, 14 So. 619; Tuck v. Louisville &c.

negligence. It is held that evidence of subsequent repairs is not competent upon the question of negligence on the part of the employer.[5] There can, of course, be no doubt that the general rules of pleading[6] and evidence apply to actions against employers under the statute except where they are changed by the statute. Thus the burden of proof on the question of the employer's negligence, no statutory provision to the contrary existing, is upon the employe.[7] The courts apply to the question of contributory negligence, so far as involves the burden of proof, the rule which prevailed at common law prior to the enactment of the statute.[8] As we have elsewhere shown, upon

R. Co., 98 Ala. 150, 12 So. 168. In the latter case the court cited Mobile &c. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146; Louisville &c. R. Co. v. Davis, 91 Ala. 487, 8 So. 552; Mobile &c. R. Co. v. George, 94 Ala. 199, 10 So. 145.

[5] Ashley v. Hart, 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355. See also ante, § 1674.

[6] Shinners v. Proprietors &c., 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554 and note, 26 Am. St. 226. This is the common rule. Nalley v. Hartford &c. R. Co., 51 Conn. 524, 50 Am. Rep. 47 and note; Terre Haute &c. R. Co. v. Clem, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. ed. 405; Ely v. St. Louis &c. R. Co., 77 Mo. 34. See authorities cited, note, Elliott Roads and Streets, 647. See as to complaint or declaration, McNamara v. Logan, 100 Ala. 187, 14 So. 175; Louisville &c. R. Co. v. Coulton, 86 Ala. 129, 5 So. 458.

[7] Regan v. Donovan, 159 Mass. 1, 33 N. E. 702; Louisville &c. R. Co. v. Binion, 98 Ala. 570, 14 So. 619. In the first case cited the court said, speaking of the defendants, that: "Proof of mere knowledge on their part that the steps were movable, without any evidence to show that movable steps were unsafe in themselves or unsuitable for the place, or that the defendants know or had reason to suppose that the owner would leave them insecure is not sufficient to sustain the burden of proof." See also Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 12 So. 374; McGuire v. Lehigh Valley R. Co., 215 Pa. St. 618, 64 Atl. 825, 7 Ann. Cas. 613.

[8] Shea v. Boston &c. R. Co., 154 Mass. 31, 27 N. E. 672; citing Hinckley v. Cape Cod R. Co., 120 Mass. 257; Crafts v. Boston, 109 Mass. 519; Guffin v. Boston &c. R. Co., 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698 and note 12 Am. St. 526. For cases holding burden on the defendant, Bromley v. Birmingham &c. R. Co., 95 Ala. 397, 11 So. 341; Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348; Guffin v. Overman &c. Co., 61 Fed. 568. See also Central I. R. Co. v. Clark, 63 Ind. App. 49, 112 N. E. 892.

the question who has the burden of proof there is stubborn conflict of authority. In Indiana it is held that an act passed after the enactment of the employers' liability act, and providing that in all actions for damages for personal injuries caused by negligence it shall not be necessary for the plaintiff to allege or prove want of contributory negligence, but that contributory negligence shall be a defense provable under the general denial, had the effect of making it unnecessary for the plaintiff to allege freedom from contributory negligence in his complaint in an action under the employers' liability act, but did not take away the defense of contributory negligence no matter by whose evidence it is made to appear.[9]

§ 1943 (1350). Presumption of negligence.—Some of the statutes provide that the occurrence of an accident resulting in injury to an employe raises a presumption of negligence on the part of the employe. It has been held that under such a statute the presumption does not arise unless the plaintiff has shown that he was not guilty of contributory negligence.[10] We can not perceive upon what principle there can be a presumption of negligence on the part of the employer in the absence of a statute providing that the occurrence of an accident shall be prima facie evidence of negligence, for the established common-law rule is that there is no such presumption, and a rudimental principle of law and logic is that "wrong is not to be presumed."

§ 1944 (1351). Selection of co-employes.—In some of the statutes it is provided that an employer shall not be liable for the negligence of a co-employe unless he has been guilty of negligence in selecting or keeping in service such co-employe. It has been held under such a statute that it is incumbent upon

[9] Pittsburg &c. R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218; Pittsburg &c. R. Co. v. Collins, 163 Ind. 569, 71 N. E. 661.

[10] Georgia &c. R. Co. v. Cosby, 97 Ga. 299, 22 S. E. 912. See Maloy v. Port Royal &c. R. Co., 97 Ga. 295, 22 S. E. 588. We have elsewhere referred to decisions holding that the common-law doctrine of contributory negligence prevails unless clearly changed by statute. Ante, § 1882. See also Duval v. Hunt, 34 Fla. 85, 15 So. 876.

the plaintiff to prove that the co-employe was incompetent, and that the employer knew, or ought to have known, that the co-employe was incompetent.[11] This is substantially the common-law rule, but is not the rule under most of the statutes, for the general rule under those statutes is that care in the selection of co-employes will not exonerate the employer from liability.[12] In a case where a section man was injured while riding on a hand-car, by being pushed off the car, the decision was that the railroad was liable under the statute.[13] A similar decision was made in an Alabama case.[14] In a recent case the question arose as to whether the master was liable where the injured employe, who belonged to a labor union, had made it a condition of service that the master should employ only those belonging to the union, and yield his freedom to select employes, and it was held that the master was not liable to the plaintiff for the negligence of one that such union required him to employ.[15]

§ 1945 (1352). Superintendents within the meaning of employers' liability acts.—Under many of the statutes the question whether an employe is under superintendence or whether he

[11] Gier v. Los Angeles &c. R. Co., 108 Cal. 129, 41 Pac. 22. But see Culver v. Alabama &c. R. Co., 108 Ala. 330, 18 So. 827, for a decision holding the master liable, although he had used care in selecting fellow-servants. The statutes are, however, essentially different. As to what is not sufficient to show incompetency, see Hamann v. Milwaukee &c. Co., 127 Wis. 550, 106 N. W. 1081. See also Cabin Branch Min. Co. v. Hutchinson's Admx., 112 Va. 37, 70 S. E. 480, Ann. Cas. 1912D, 93 n.

[12] Northern Pacific R. Co. v. Behling, 57 Fed. 1037; Hissong v. Richmond &c. R. Co., 91 Ala. 514, 8 So. 776; Louisville &c. R. Co. v. Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. 21; Georgia &c. R. Co. v. Brown, 86 Ga. 320, 12 S. E. 812; Rine v. Chicago &c. R. Co., 100 Mo. 228, 12 S. W. 640, 41 Am. & Eng. R. Cas. 555; Unfried v. Baltimore &c. R. Co., 34 W. Va. 260, 12 S. E. 512. See generally Chambliss v. Mary Lee &c. R. Co., 104 Ala. 665, 16 So. 572.

[13] Steffenson v. Chicago &c. R. Co., 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271. See generally Hall v. Chicago &c. R. Co., 46 Minn. 439, 49 N. W. 239.

[14] Richmond &c. R. Co. v. Hammond, 93 Ala. 181, 9 So. 577.

[15] Farmer v. Kearney, 115 La. Ann. 722, 39 So. 967, 3 L. R. A. (N. S.) 1105.

receives an injury while acting in obedience to the orders or directions of a superintendent is often one of importance and difficulty. The term "superintendent" has, perhaps, as a general rule, a wider meaning under an employers' liability act than that assigned it at common law. In some cases an employe occupying the position of a foreman, and who would not be regarded as a superior agent or vice-principal at common law, is a superintendent under the statute in such a sense as to make the common master responsible for his negligence.[16] Under the Massachusetts statute a railroad company is held not to be liable for the errors of an employe although he does occasionally perform acts of superintendence.[17] In the case just referred to it is said:[18] "The law recognizes that an employe may have two duties, that he may be a superintendent

[16] Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88, 53 Am. & Eng. R. Cas. 115. To same effect are also Consolidated Stone Co. v. Ellis, 46 Ind. App. 80, 91 N. E. 1095; McGuire v. Quincy &c. R. Co., 128 Mo. App. 677, 107 S. W. 411; Laplaca v. Lake Shore &c. R. Co., 194 N. Y. 562, 87 N. E. 1121; Rippy v. Southern R. Co., 80 S. Car. 539, 61 S. E. 1010, 21 L. R. A. (N. S.) 601. See generally ante, § 1929.

[17] Cashman v. Chase, 156 Mass. 342, 31 N. E. 4. And to the same effect is Hartford v. Northern Pac. R. Co., 91 Wis. 374, 64 N. W. 1033. See also Whittaker v. Bent, 167 Mass. 588, 46 N. E. 121; Whelton v. West End St. R. Co., 172 Mass. 555, 52 N. E. 1072; Brittain v. West End St. R. Co., 168 Mass. 10, 46 N. E. 111; Shepard v. Boston &c. R. Co., 158 Mass. 174, 33 N. E. 508; Vecchioni v. New York &c. R. Co., 191 Mass. 9, 77 N. E. 306. But as to who are superintendents and to the effect that if the act is one of superintendence the fact that they may also perform manual labor will not make any difference, see Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88; Canney v. Walkeline, 113 Fed. 66, 58 L. R. A. 33 and note; Louisville &c. R. Co. v. Mothershed, 97 Ala. 261, 12 So. 714; Crowley v. Cutting, 165 Mass. 436, 43 N. E. 197; McCoy v. Westborough, 172 Mass. 504, 52 N. E. 1064; Murphy v. New York &c. R. Co., 187 Mass. 18, 72 N. E. 330; Byrne v. Learnard, 191 Mass. 269, 77 N. E. 316. And see generally, note in 58 L. R. A. 33; Choctaw &c. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; Mikos v. New York &c. R. Co., 191 N. Y. 506, 84 N. E. 1116.

[18] In the case referred to the court cited: Shaffers v. General &c. Navigation Co., L. R. 10 Q. B. D. 356; Osborne v. Jackson, L. R. 11 Q. B. D. 619; Kellard v. Rooke, L. R. 19 Q. B. D. 585, and L. R. 21 Q. B. D. 367.

for some purposes and also an ordinary workman, and that if negligent in the latter capacity the employer is not answerable." The familiar rule is that where a right is given by a statute a plaintiff who seeks to avail himself of such a right must make a case within the statute, and it is therefore correctly held that where the statute makes the liability of the employers depend upon the fact that the employe whose negligence caused the injury was a superintendent, that fact must be affirmatively proved by the plaintiff.[19]

§ 1946 (1353). What constitutes negligence in superintendence.—The plaintiff has the burden of proving, in order to make a case under the statutes, that the person whose negligence caused the injury was a superintendent, and at the time the accident occurred was engaged in the duty of superintendence.[20] The negligence of a person in charge and control in the capacity of a superintendent may consist in the omission to use ordinary care to keep appliances, works and ways in a reasonably safe condition for use by employes whose duty is to work with such machinery and appliances.[21] The failure of an employe in charge or control to exercise ordinary care to make the place where other employes are required to work reasonably safe may constitute negligence,[22] and so negligence

[19] Fitzgerald v. Boston &c. R. Co., 156 Mass. 293, 31 N. E. 7. In the case cited the court referred to Hodgkins v. Eastern R. Co., 119 Mass. 419; Connors v. Holden, 152 Mass. 598, 26 N. E. 137. See also Ashley v. Hart, 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355; McDonnell v. Oceanic Steam &c. Co., 143 Fed. 480.

[20] Dantzler v. De Bardeleben &c. Co., 101 Ala. 309, 14 So. 10, 22 L. R. A. 361; McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464; Shepard v. Boston &c. R. Co., 158 Mass. 174, 33 N. E. 508 (citing Clifford v. Old Colony &c. R. Co., 141 Mass. 564, 6 N. E. 751); Shaffers v. General &c. Navigation Co., L. R. 10 Q. B. D. 356; Kellard v. Rooke, L. R. 19 Q. B. D. 585; ante, § 1945. See Hennessy v. Boston, 161 Mass. 502, 37 N. E. 668; McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007; Shea v. Wellington, 163 Mass. 364, 40 N. E. 73; Osborne v. Jackson, L. R. 11 Q. B. D. 619; note in 58 L. R. A. 33, 34.

[21] Seaboard &c. Co. v. Woodson, 94 Ala. 143, 10 So. 87; Hall v. Posey, 79 Ala. 84; Louisville &c. R. Co. v. Coulton, 86 Ala. 129, 5 So. 458; Western &c. R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877.

[22] Hennessy v. Boston, 161 Mass. 502, 37 N. E. 668.

may consist in furnishing defective appliances or in placing appliances in unsafe positions so as to endanger the safety of employes.[23] Many other illustrations of negligence in superintendence will be found in the cases cited below.[24] The superintendent is bound to exercise reasonable care, and the employer cannot escape liability for his negligence upon the ground that due care was exercised in employing him.[25]

§ 1947 (1354). Cars—Trains—Meaning of term "cars" as used in statutes enlarging liabilities of railroad companies.— The term "cars," when employed in an employers' liability act, may be taken to mean any kind of vehicle other than a locomotive or tender used by a railroad company for the transportation of passengers, employes, or property upon and along its tracks. The term is not confined to coaches nor to freight cars, but embraces all kinds of cars. A hand-car is "a car" within the meaning of the statute.[26] A locomotive and one or

[23] Illinois Car &c. Co. v. Walch, 132 Ala. 490, 31 So. 470; Collier v. Coggins, 103 Ala. 281, 15 So. 578; Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88. See also Postal Tel. &c. Co. v. Hulsey, 132 Ala. 444, 31 So. 527.

[24] Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306; Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007; Hooe v. Boston &c. St. R. Co., 187 Mass. 67, 72 N. E. 341; McHugh v. Manhattan R. Co., 179 N. Y. 378, 72 N. E. 312; Faith v. New York &c. R. Co., 95 N. Y. S. 774, affirmed in 185 N. Y. 556, 77 N. E. 1186; and note in 58 L. R. A. 33, et seq.; Aitken v. Newport &c. Co. (1887), 3 Times L. R. 527. See also Choctaw &c. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Under the Indiana statute designating certain employes as vice-principals, the act need not be one of superintendence or in regard to a non-delegable duty. Chicago &c. R. Co. v. Williams, 168 Ind. 276, 79 N. E. 442.

[25] Malcom v. Fuller, 152 Mass. 160, 25 N. E. 83.

[26] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262. See Richmond &c. R. Co. v. Hammond, 93 Ala. 181, 9 So. 577; San Antonio &c. R. Co. v. Stevens, 37 Tex. Civ. App. 80, 83 S. W. 235; Texas &c. R. Co. v. Hervey (Tex. Civ. App.), 89 S. W. 1095; Texas &c. R. Co. v. Smith, 114 Fed. 728. In the case first cited the court referred to the definitions of the word car given in Webster's dictionary and in the Century dictionary and among other things, said: "It is not necessary that the car be connected in any way with

more cars coupled to it constitute a train within the meaning of the Massachusetts statute,[27] but in order to constitute a train it is not necessary that the cars should be attached to a locomotive or that two or more cars should be coupled together at the precise time of the occurrence of the accident.[28] A single car on its way to be returned to its owner is held not to be part of the ways, works or machinery of a railroad company.[29]

§ 1948 (1355). Use and operation of railway—Meaning of term.—Some of the statutes use the term "any wrongs connected with the use and operation of any railway," and controversy has arisen as to the meaning to be ascribed to the term.[30] In one of the cases where an employe engaged in

a locomotive, or with other cars forming a train." See also Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 681; Philadelphia &c. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112. But compare Bryce v. Burlington &c. R. Co., 119 Iowa 274, 93 N. W. 275, 97 Am. St. 310; Blanchard v. Detroit &c. R. Co., 139 Mich. 694, 103 N. W. 170; Lake Shore &c. R. Co. v. Benson, 85 Ohio St. 215, 97 N. E. 417, 41 L. R. A. (N. S.) 49, Ann. Cas. 1913A, 945n.

[27] Dacey v. Old Colony R. Co., 153 Mass. 112, 26 N. E. 437. See also United States v. Chicago B. & Q. R. Co., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. ed. 1023; United States v. Erie R. Co., 237 U. S. 402, 35 Sup. Ct. 621, 59 L. ed. 1019.

[28] Devine v. Boston &c. R. Co., 159 Mass. 348, 34 N. E. 539; Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112. The rule under the English act is the same as that stated in the text. Cox v. Great Western &c. R. Co., L. R. 9 Q. B. D. 106.

[29] Coffee v. New York &c. R. Co., 155 Mass. 21, 28 N. E. 1128, 48 Am. & Eng. R. Cas. 370.

[30] See Beleal v. Northern Pac. R. Co., 15 N. Dak. 318, 108 N. W. 33, 11 Ann. Cas. 921 (held not within the statute); Chicago &c. R. Co. v. Stahley, 62 Fed. 363 (all held within the statute); Atchison &c. R. Co. v. Brassfield, 51 Kans. 167, 32 Pac. 814; Atchison &c. R. Co. v. Vincent, 56 Kans. 444, 43 Pac. 251; Johnson v. St. Paul &c. R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419 (both held not within the statute); Smith v. St. Paul &c. R. Co., 44 Minn. 17, 46 N. W. 149; Steffenson v. Chicago &c. R. Co., 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271 (held within the statute); Nicholas v. Chicago &c. R. Co., 60 Minn. 319, 62 N. W. 386; Leier v. Minnesota &c. Co., 63 Minn. 203, 65 N. W. 269 (all held within statute); Blomquist v. Great Northern R. Co., 65 Minn. 69, 67 N. W. 804 (held within the statute); Holtz v. Great Northern R. Co., 69 Minn. 524, 72 N. W. 805; Callahan v. St. Louis &c. R.

elevating coal into a shed was injured, it was held that the plaintiff was not within the statute,[31] but in a later case, in the same court, a somewhat different view was taken, and it was held that a section man, injured while using a hand-car, was within the statute, and that the statute was not confined to cases of employes engaged in moving trains, as held in the earlier case.[32] The doctrine declared in the case last referred to was asserted in a case in which it was held that a section man injured while on a hand-car by his feet catching in the rails of the track was entitled to recover.[33] As already shown,

Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. 746 (section man injured by other section men held within the statute); Orendorff v. Terminal Assn., 116 Mo. App. 348, 92 S. W. 148 (employe engaged in trucking freight held within the statute); Galveston &c. R. Co. v. Mohrmann, 42 Tex. Civ. App. 374, 93 S. W. 1090 (not within statute); Mounce v. Lodwick Lumber Co. (Tex. Civ. App.), 91 S. W. 240 (servant of sawmill company operating private railroad held within statute).

[31] Stroble v. Chicago &c. R. Co., 70 Iowa 555, 31 N. W. 63, 59 Am. Rep. 456, citing Foley v. Chicago &c. R. Co., 64 Iowa 644, 21 N. W. 124; Malone v. Burlington &c. R. Co., 65 Iowa 417, 21 N. W. 756, 54 Am. Rep. 11. See also Depuy v. Chicago &c. R. Co., 110 Mo. App. 10, 84 S. W. 103.

[32] Larson v. Illinois Cent. R. Co., 91 Iowa 81, 58 N. W. 1076. See also Akeson v. Chicago &c. R. Co., 106 Iowa 54, 75 N. W. 676; Handelun v. Burlington &c. R. Co., 72 Iowa 709, 32 N. W. 4.

[33] Chicago, M. & St. P. R. Co. v. Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. ed. 747. In the case cited the court reviewed the cases of Schroeder v. Chicago &c. R. Co., 47 Iowa 375; Pyne v. Chicago &c. R. Co., 54 Iowa 223, 6 N. W. 281, 37 Am. Rep. 198; Smith v. Burlington &c. R. Co., 59 Iowa 73, 12 N. W. 763; Malone v. Burlington &c. R. Co., 61 Iowa 326, 16 N. W. 203, 47 Am. Rep. 813; Foley v. Chicago &c. R. Co., 64 Iowa 644, 21 N. W. 124; Malone v. Burlington &c. R. Co., 65 Iowa 417, 21 N. W. 756, 54 Am. Rep. 11; Luce v. Chicago &c. R. Co., 67 Iowa 75, 24 N. W. 600; Matson v. Chicago &c. R. Co., 68 Iowa 22, 25 N. W. 911; Stroble v. Chicago &c. R. Co., 70 Iowa 555, 31 N. W. 63, 59 Am. Rep. 456; Pierce v. Central &c. R. Co., 73 Iowa 140, 34 N. W. 783; Nelson v. Chicago &c. R. Co., 73 Iowa 576, 35 N. W. 611, and Rayburn v. Central R. Co., 74 Iowa 637, 35 N. W. 606. It seems to us that the earlier Iowa cases hold that an employe not engaged in moving or operating trains is not within the statute and that the later cases have to some extent, at least, departed from that doctrine. Haden v. Sioux City R. Co., 92 Iowa 226, 60 N. W. 537; Butler v. Chicago &c. R. Co., 87 Iowa 206,

there is some conflict of authority upon this question even where the statute does not expressly limit its application to injuries received in the operation of a train or the like.[34]

§ 1949 (1356). **"Charge and control."**—It often becomes important to determine the meaning of the words "charge and control," for cases sometimes turn upon the meaning to be ascribed to those words.[35] In one of the English cases it was suggested that probably the words are intended to mean different things, but there was no authoritative decision upon the question.[36] The Massachusetts decisions, however, hold the words to be

54 N. W. 208. See also Missouri &c. R. Co. v. Smith, 45 Tex. Civ. App. 128, 99 S. W. 743.

[34] See ante, §§ 1936, 1937.

[35] The first clause of the Indiana statute relating to defects in ways, etc., is merely a re-enactment of the common law rule. Indiana Un. Trac. Co. v. Long, 176 Ind. 532, 96 N. E. 604. The fourth clause of the Indiana statute makes the company liable to an employe, who is free from contributory negligence, for injury to him caused by the negligence of any person in the service of the company who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon the railway, or of any person, co-employe, or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct. It is held that it does not include a brakeman merely charged with the duty of opening and closing a switch. Baltimore &c. R. Co. v. Little, 149 Ind. 167, 48 N. E. 862, and that the first part of the clause is not limited by the latter, and it is unnecessary to allege and prove that the injured employe, in cases based on the first subdivision, was obeying or conforming to the order of some superior at the time having authority to direct. Indianapolis Un. R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787. But this clause enlarges the common law class of vice-principals. Chicago &c. Ry. Co. v. Williams, 168 Ind. 276, 79 N. E. 442. See also for other decisions under this clause, Chicago &c. R. Co. v. Lain, 170 Ind. 84, 83 N. E. 632; Cleveland &c. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158; Cleveland &c. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Wabash R. Co. v. Beedle, 173 Ind. 437, 90 N. E. 760. The last subdivision is no broader than the common law, if indeed, it is as broad. Thacker v. Chicago &c. R. Co., 159 Ind. 82, 86, 64 N. E. 605, 59 L. R. A. 792.

[36] Gibbs v. Great Western R. Co., L. R. 11 Q. B. D. 22, and L. R. 12 Q. B. D. 208.

"explanatory of each other."[37] The American cases hold that it is not necessary, in order to bring a case within the statute, that the "charge or control" should be permanent, but that it is sufficient to show that the "charge or control" was in the employe whose negligence caused the injury at the time the accident occurred.[38] The English authorities seem to lay down a somewhat different doctrine.[39] It has been held that it can not be determined as matter of law who is in charge or control at a particular time, and that the question is one of fact for the jury,[40] but we think there may be cases in which the question may be one of law. The rank of the person to whom charge or control is given is not important, for the important element is the fact of actual charge and control. A brakeman or other subordinate employe may be a person in charge or control.[41] But, where the engineer is present and directing, the fireman is not in charge and control while performing his ordinary duties.[42] A conductor of a train may be in charge or control, although he may be temporarily absent from the train.[43] It is held that the charge and control must exist at

[37] Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112, citing Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; Lynch v. Boston &c. R. Co., 159 Mass. 536, 34 N. E. 1072; Devine v. Boston &c. R. Co., 159 Mass. 348, 34 N. E. 539; Donahoe v. Old Colony &c. R. Co., 153 Mass. 356, 26 N. E. 868; Thyng v. Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425.

[38] Steffe v. Old Colony &c. R. Co., 156 Mass. 262, 30 N. E. 1137; Louisville &c. R. Co. v. Richardson, 100 Ala. 232, 14 So. 209.

[39] Gibbs v. Great Western &c. R. Co., L. R. 12 Q. B. 208, and L. R. 11 Q. B. D. 22.

[40] Louisville &c. R. Co. v. Richardson, 100 Ala. 232, 14 So. 209, citing Louisville &c. R. Co. v. Mothershed, 97 Ala. 261, 12 So. 714.

[41] Steffe v. Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137, citing Cox v. Great Western &c. R. Co., L. R. 9 Q. B. D. 106. But see Caron v. Boston &c. R. Co., 164 Mass. 523, 42 N. E. 112. Yardmaster may be in charge or control of train. Brady v. New York &c. R. Co., 184 Mass. 225, 68 N. E. 227.

[42] Louisville &c. R. Co. v. Goss, 137 Ala. 319, 34 So. 1007.

[43] Donahoe v. Old Colony R. Co., 153 Mass. 356, 26 N. E. 868; Carroll v. New York &c. R. Co., 182 Mass. 237, 65 N. E. 69. But see Thyng v. Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425.

the time the injury is inflicted.[44] It has also been held that a foreman of a gang of men may be a person in charge or control of a car.[45] And the Indiana statute, making the company liable for negligence of an employe "in charge of any locomotive engine or train," applies in favor of an engineer injured by the negligence of another locomotive engineer, and also in favor of a conductor injured by the negligence of the engineer of the locomotive of the same train.[46]

§ 1950 (1356a). Person to whose order the injured servant was bound to conform and did conform.—Some of the statutes give a right of action to an employe who is injured, while in the exercise of due care and diligence, by the negligence of another to whose order or direction the injured employe was bound to conform, and did conform.[47] The injury must be caused by the negligence of such a person,[48] but it has been

[44] Chicago &c. R. Co. v. Touhy, 26 Ill. App. 99; Chicago &c. R. Co. v. Richards, 28 Ind. App. 46, 61 N. E. 18 (but it is not necessary that the plaintiff should have been employed on the train in charge of the negligent employe).

[45] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262; Richmond &c. R. Co. v. Hammond, 93 Ala. 181, 9 So. 577. For cases of engineers held in charge or control, see Hissong v. Richmond &c. R. Co., 91 Ala. 514, 8 So. 776; Alabama &c. R. Co. v. McDonald, 112 Ala. 216, 20 So. 472; Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070; McCord v. Cammeli (1896), A. C. 57, 65 L. J. Q. B. (N. S.) 202. See also Southern Ind. R. Co. v. Baker, 37 Ind. App. 405, 77 N. E. 64.

[46] Pittsburg &c. R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034; Pittsburg &c. R. Co. v. Collins, 163 Ind. 569, 71 N. E. 661. See also Caron v. Boston &c. R. Co., 164 Mass. 523, 529, 42 N. E. 112.

[47] See as to what must be shown under this provision, Louisville &c. R. Co. v. Wagner, 153 Ind. 420, 53 N. E. 927; Thacker v. Chicago &c. R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886; Indianapolis &c. Transit Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. 185; Central &c. R. Co. v. Lamb, 124 Ala. 172, 26 So. 969.

[48] Grand Rapids &c. R. Co. v. Pettit, 27 Ind. App. 120, 60 N. E. 1000; Hodges v. Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; Thacker v. Chicago &c. R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792. See also Fergerson v. Galt Pub. School, 27 Ont. App. 480; Howard v. Bennett, 58 L. J. (Q. B.) 129.

held that it need not immediately follow the order.[49] There is some doubt as to whether the order must be a special order or may relate to the general discharge of duties, but we think that a somewhat general order may be sufficient to bring the case within the statute.[50] And it has lately been held under a recent amendment of the Indiana statute making the master liable where the injury resulted from the injured employe's "obedience to any order or direction of the employer or of any employe to whose orders or directions he was under obligation to conform or obey," that the statute means just what it says and includes a general as well as a special order.[51] An employe

[49] Indianapolis Gas Co. v. Schumack, 23 Ind. App. 87, 54 N. E. 414. And it is not always necessary that the injury should arise directly from obedience to the order; it may be sufficient if it arises while complying with the order. Richey v. Cleveland &c. R. Co., 176 Ind. 542, 96 N. E. 694, 47 L. R. A. (N. S.) 121. See also Louisville &c. R. Co. v. Wagner, 153 Ind. 420, 53 N. E. 927; Millward v. Midland R. Co., L. R. (1884) 14 Q. B. Div. 68; Wild v. Waygood (1892) 1 Q. B. 783. That the negligence rendering the company liable may be in the subsequent act or omission of the employe who gave the order, see, also Lake Erie &c. R. Co. v. Charman, 161 Ind. 95, 67 N. E. 923; Thacker v. Chicago &c. R. Co., 159 Ind. 82, 92, 93, 64 N. E. 605, 59 L. R. A. 792; and see Barnett &c. Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343. For cases in which the orders and negligence of foreman and the like have been held to make the master liable, see Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Wild v. Waygood (1892), 1 Q. B. 783.

[50] Cincinnati &c. R. Co. v. Thieband, 114 Fed. 918; Pittsburg &c. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Indianapolis &c. Trac. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; Richey v. Cleveland &c. R. Co., 176 Ind. 524, 548, 96 N. E. 694; Evansville &c. R. Co. v. Lipking, 183 Ind. 572, 109 N. E. 47; American C. & F. Co. v. Williams, 63 Ind. App. 1, 113 N. E. 252; Millward v. Midland R. Co., L. R. (1884) 14 Q. B. Div. 68; Cox v. Hamilton &c. Co., 14 Ont. Rep. 300. But compare Grand Rapids &c. R. Co. v. Pettit, 27 Ind. App. 120, 60 N. E. 1000; Standard S. C. Co. v. Martinecz (Ind. App.), 113 N. E. 244; Mobile &c. R. Co. v. George, 94 Ala. 199, 10 So. 145. It is held that the order must not be as broad as the service. Southern Ind. R. Co. v. Harrell, 161 Ind. 689, 694, 68 N. E. 262, 63 L. R. A. 460; McElwaine &c. Co. v. Wall, 166 Ind. 267, 76 N. E. 408; Chicago &c. Co. v. Lain, 170 Ind. 84, 83 N. E. 632.

[51] Vivian Colliers Co. v. Cahall, 184 Ind. 473, 110 N. E. 672. And an order, even if a special one is required, may be given without

does not assume the risk of unknown danger caused by the negligence of the very person to whose order he is bound to conform, and does conform.[52]

§ 1951 (1357). Contributory negligence—Doctrine of as affected by the statute.—We have elsewhere treated of the effect of statutes upon the doctrine of contributory negligence,[53] and we do not deem it necessary to add very much to what was there said. It seems very clear to us that the statute cannot be held to abrogate a rule so long and so firmly established as the rule upon the subject of contributory negligence, unless the statute by express words or clear and unmistakable implication abrogates the rule. Our conclusion is well fortified by authority and rests on sound principle.[54]

words, as by merely pressing a button. Tennessee &c. R. Co. v. Cottrell, 172 Ala. 538, 55 So. 791. See also Strong v. Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799; Meier v. Way & Co., 136 Iowa 302, 111 N. W. 420, 125 Am. St. 254.

[52] Pittsburg &c. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Woodward Iron Co. v. Andrews, 114 Ala. 243, 21 So. 440, 443. See also Louisville &c. R. Co. v. Wagner, 153 Ind. 420, 53 N. E. 927; Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360, 361, 363, 65 N. E. 1034; Davis v. New York &c. R. Co., 159 Mass. 532, 34 N. E. 1070, 1072; Southern R. Co. v. Johnson, 114 Ga. 329, 40 S. E. 235, 236. And compare Covington v. Cinncinnati &c. R. Co., 144 Ky. 646, 139 S. W. 854, 855; Ft. Smith &c. R. Co. v. Blevins, 35 Okla. 378, 130 Pac. 525, 528.

[53] Ante, § 1882. For the rule under the Georgia statute, see Campbell v. Atlanta &c. R. Co., 53 Ga. 488; Central &c. R. Co. v. Kelly, 58 Ga. 107; Thompson v. Central R. Co., 54 Ga. 509; Central &c. R. Co. v. Mitchell, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145. In Pittsburgh &c. R. Co. v. Sudhoff, 173 Ind. 314, 90 N. E. 467, it is held that negligence of a brakeman directed by engineer to close a switch does not impute negligence to the engineer so as to render him guilty of contributory negligence, and that the engineer could recover under the statute where another engineer ran his train at high speed on to the switch in disregard of absence of a safety signal light and injured the plaintiff.

[54] Murphy v. Chicago &c. R. Co., 45 Iowa 661; Geyette v. Fitchburg R. Co., 162 Mass. 549, 39 N. E. 188, citing Chandler v. New York &c. R. Co., 159 Mass. 589, 35 N. E. 89; Tyndale v. Old Colony R. Co., 156 Mass. 503, 31 N. E. 655; Felt v. Boston &c. R. Co., 161 Mass. 311, 37 N. E. 375; Irwin v. Alley, 158 Mass. 249, 33 N. E. 517, and distin-

§ 1952 (1358). **Contracts waiving right of action invalid.**— The Alabama court holds a contract on the part of an employe not to hold the employer responsible for injuries resulting from the negligence of other employes to be invalid,[55] and there are other recent decisions to the same effect.[56] The English cases assert a different doctrine.[57] In Massachusetts it is held that the employe may effectively contract that the employer shall not be responsible for obvious defects.[58] Many of the statutes themselves provide that any contract attempting to release the company from its liability to an employe under the statute shall be null and void, and such a provision has been held constitu-

guishing Maguire v. Fitchburg Railroad Co., 146 Mass. 379, 15 N. E. 904; Columbus &c. R. Co. v. Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. 58 and note; Columbus &c. R. Co. v. Bradford, 86 Ala. 574, 6 So. 90; Louisville &c. R. Co. v. Orr, 91 Ala. 548, 8 So. 360; Memphis &c. R. Co. v. Graham, 94 Ala. 545, 10 So. 283; Richmond &c. R. Co. v. Thomason, 99 Ala. 471, 12 So. 273; Thyng v. Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. 425; Maher v. Boston &c. R. Co., 158 Mass. 36, 32 N. E. 950; Trinity &c. R. Co. v. Mitchell, 72 Tex. 609, 10 S. W. 698; Weblin v. Ballard, L. R. 17 Q. B. D. 122. See also Hancock v. Norfolk &c. R. Co., 124 N. Car. 222, 32 S. E. 679; Whitcomb v. Standard Oil Co., 153 Ind. 513, 55 N. E. 440; Shaver v. Home Tel. Co., 36 Ind. App. 233, 75 N. E. 288; Buckner v. Richmond &c. R. Co., 72 Miss. 878, 18 So. 449; Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356, 49 S. E. 489. Duty of employe to adopt the safer of two lines of conduct. Chase v. Burlington &c. R. Co., 76 Iowa 675, 38 Am. & Eng. R. Cas. 148; Tennessee &c. Co. v. Herndon, 100 Ala. 451, 14 So. 287. But see under Indiana Act of March 2, 1911, in regard to employers employing five or more persons. American Car &c. Co. v. Wyatt, 58 Ind. App. 161, 108 N. E. 12; Vivian Colliers Co. v. Cahill, 184 Ind. 473, 110 N. E. 672. The statute was held constitutional in Terre Haute &c. T. Co. v. Weddle, 183 Ind. 305, 108 N. E. 225. See also chapters on Safety Appliance Acts and on Federal Employers' Liability Act.

[55] Hissong v. Richmond &c. R. Co., 91 Ala. 514, 8 So. 776.

[56] See Kansas &c. R. Co. v. Peavy, 29 Kans. 169, 44 Am. Rep. 630; Atchison &c. R. Co. v. Fronk, 74 Kans. 519, 87 Pac. 698, 11 Ann. Cas. 174; Illinois Cent. R. Co. v. Harris, 108 Miss. 574, 67 So. 54; Wilson v. Southern R., 73 S. Car. 481, 53 S. E. 968. But compare Chicago &c. R. Co. v. Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. 456 and note.

[57] Griffiths v. Earl of Dudley, 9 Q. B. D. 357.

[58] O'Maley v. South Boston &c. Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161 and note.

tional and valid.[59] And in a recent Iowa case the court held that a statute providing that no contract of insurance, relief, or indemnity, entered into prior to the injury, should be a defense to any action under the statute, was not unconstitutional.[60]

[59] Mumford v. Chicago &c. R. Co., 128 Iowa 685, 104 N. W. 1135; Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. 301. See also Pittsburgh Ry. Co. v. Ross, 169 Ind. 3, 80 N. E. 845; Chicago &c. R. Co. v. Bond, 240 U. S. 449, 36 Sup. Ct. 408, 60 L. ed. 735; Chicago, B. & C. R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328; and chapter on Federal Employers' Liability Act, post ch. LVIII. But it has been held not to apply to the acceptance of benefits from a relief department and a release of the company on such acceptance. Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419. But compare Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867; Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778n. See on this phase of the subject note in 11 L. R. A. (N. S.) 194.

[60] McGuire v. Chicago &c. R. Co., 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706. Many cases are cited and reviewed in the prevailing opinion and in the dissenting opinion. This case was affirmed in 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328. See also to same effect, Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867 n.; and compare Burnett v. Atlantic Coast Line R. Co., 163 N. Car. 186, 79 S. E. 414; Baltimore &c. R. Co. v. Gawniske, 197 Fed. 31.

CHAPTER LVIII

FEDERAL EMPLOYERS' LIABILITY ACT

Sec.
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§ 1960 (1358a). Recent Act of Congress.—One of the most radical of the "Employers' Liability Acts" was the Act of Congress, approved June 11, 1906, "relating to the liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the states, and between the states and foreign nations," to their employes.[1] But this Act was held unconstitutional by the Supreme Court of the United States on the ground that it attempted to regulate intrastate as well as interstate commerce and the provisions as to the one were not so independent that they could

[1] 34 Stat. 232, 233, C. 3073.

be separated from the other.[2] In 1908, however, Congress passed another act upon the subject, which was amended in 1910 by elaborating section 6 of the Act and adding section 9, and this Act has been held constitutional and valid by the Supreme Court of the United States.[3] This Act and the amend-

[2] Prior to the decision of the Supreme Court of the United States several of the lower Federal courts had held the statute valid, and among such decisions, see Snead v. Central &c. R. Co., 151 Fed. 608; Spain v. St. Louis &c. R. Co., 151 Fed. 522. And the Supreme Court of the United States held it valid as to the District of Columbia and territories. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106.

[3] 35 U. S. St. At L. 65, 66, Ch. 149, U. S. Comp. St. Supp. 1911, pp. 1322—1325; 36 St. At L. 291, Ch. 143, U. S. Comp. St. Supp. 1911, pp. 1324, 1325. The original Act of 1908 is also set out in Mondon v. New York &c., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 46, and in 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31, 32; Rich v. St. Louis &c. R. Co., 166 Mo. App. 379, 148 S. W. 1011; and the amendment is set out in the note in 47 L. R. A. (N. S.) 39; Mondon v. New York &c. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 227, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44; Philadelphia &c. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911. Section 1 of the Act provides that "every common carrier by railroad while engaging in commerce between any of the states or territories, or between any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative for the benefit of his or her surviving widow or husband and children of such employes; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such (common) carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 2 makes the same provision as to the liability of every such carrier "in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States" to "any person suffering injury while he is employed in any of said jurisdictions," or, in case of his death, to his or her personal representative, etc.

Section 3 provides "that in all actions hereafter brought against

any common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

Section 4 provides "that in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of such employes contributed to the injury or death of such employe."

Section 5 provides "that any contract rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this act, shall to that extent be void: Provided, that in any action brought against any such common carrier or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

Section 6, as amended, provides "that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Section 7 provides that the term "common carrier" as used in the act "shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

Section 8 provides "that nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employes, under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An Act Relating to Liability of

ment thereto are construed as prospective and are not retroactive.[4]

§ 1961. **Act supersedes state laws.**—The Act in question supersedes the common law and all state and territorial legislation covered by it.[5] In such cases the injured employe can not recover damages either at common law or under a state

Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations, to their Employes (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1911, p. 1316), approved June eleventh, nineteen hundred and six."

Section 9, added by the amendment, provides "that any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow, or husband and children of such employe, and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe; but in such case there shall be only one recovery for the same injury."

[4] St. Louis &c. R. Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031; Hall v. Chicago &c. R. Co., 149 Fed. 564; Plummer v. Northern Pac. R. Co., 152 Fed. 206; Winfree v. Northern Pac. R. Co., 173 Fed. 65, 44 L. R. A. (N. S.) 841 n., affd. in 227 U. S. 296, 33 Sup. Ct. 273, 57 L. ed. 518; Zikos v. Oregon &c. Co., 179 Fed. 893; Newell v. Baltimore &c. R. Co., 181 Fed. 698; Cain v. Southern R. Co., 199 Fed. 211; Morrison v. Baltimore &c. R. Co., 40 App. D. C. 391. But see as to provision in regard to contract exempting carrier from liability, Philadelphia &c. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; and as to removal of causes, Fell v. Chesapeake &c. R. Co., 204 Fed. 918, 47 L. R. A. (N. S.) 21.

[5] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176; St. Louis &c. R. Co. v. Hesterley, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106; Taylor v. Southern R. Co., 178 Fed. 380; Illinois Cent. R. Co. v. Nelson, 203 Fed. 956; Southern R. Co. v. Howertson, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; South Cov. &c. St. R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Illinois Cent. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; Rich v. St. Louis &c. Ry. Co., 166 Mo. App. 379; Burnett v. Atlantic &c. R. Co., 163 N. Car. 186, 79 S. E. 414; De Rivera v. Atchison &c. R. Co. (Tex. Civ. App.), 149 S. W. 223; Rowlands v. Chicago &c. R. Co., 149 Wis. 51, 135 N. W. 156, Ann. Cas. 1916E, 714 n.

statute.[6] But the provision against assumption of risks refers only to cases in which a federal statute has been violated and leaves the doctrine of assumption of risks in other cases as it was before.[7]

§ 1962. Construction of Act—Generally.—The general theory, effect and purpose of the Act are well stated in a lower court Federal case;[8] and in a leading case decided by the Supreme Court of the United States;[9] but there is some difference of opinion as to whether it should be liberally or strictly construed.[10] The decisions of the Supreme Court of the United

[6] Smith v. Camas Prairie R. Co., 216 Fed. 799; Taylor v. Taylor, 232 U. S. 363, 64 Sup. Ct. 350, 58 L. ed. 638 (so as to distribution among beneficiaries); Vickery v. London &c. R. Co., 87 Conn. 634, 89 Atl. 277; Burtnett v. Erie R. Co., 159 App. Div. 712, 144 N. Y. S. 969. See also St. Louis & M. S. R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160.

[7] Southern R. Co. v. Carson, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. ed. 907; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1n, Ann. Cas. 1915B, 475n; Northern Pac. R. Co. v. Maerkl, 198 Fed. 1; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; Barker v. Kansas City &c. R. Co., 88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99.

[8] Fulgham v. Midland Val. R. Co., 167 Fed. 660 (this case was reversed, however, in 181 Fed. 91, L. R. A. 1917E, 1 n., on the ground that no negligence on the part of the company was shown).

[9] Mondou v. New York &c. R. Co., 223 U. S. 1, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. 169, 56 L. ed. 327, and see Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176 n. See also Thornton's Federal Employers' Liability and Safety Appliance Acts, § 1, and appendix, quoting from Congressional Record.

[10] It seems to us that, while it is in many respects in derogation of the common law, it should be, and has been fairly and reasonably construed, rather than too strictly in view of the purpose of the Act and evils to be remedied. See Teel v. Chesapeake &c. R. Co., 204 Fed. 918, 47 L. R. A. (N. S.) 21; St. Louis &c. R. Co. v. Conley, 187 Fed. 949; The Passaic, 190 Fed. 644, 204 Fed. 266; De Atley v. Chesapeake &c. R. Co., 201 Fed. 591; Baltimore &c. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225; Thornton Employers' Liability & Safety Appliance Acts, § 21. But compare Behrens v. Illinois Cent. R. Co., 192 Fed. 581. The pleadings are usually liberally construed so as to bring the case within the statutes. Missouri &c. R. Co. v. Wulf, 226

States in construing the Act are, of course, binding upon the state courts;[11] and the decisions of the federal courts have been held to control in such matters as the determination as to when the carrier is guilty of negligence under the Act, as to whether the res ipsa loquitur doctrine applies, as to assumption of risks, legal sufficiency of the evidence to require submission to a jury, measure of damages, instructions, and the like.[12]

§ 1963. Provision as to negligence—Cars, works, appliances or equipment, etc.—In all cases under the Act it is necessary to show negligence on the part of the defendant or some employe,[13] and it has been held, in accordance with the rule generally applied in the Federal courts, that the maxim, res ipsa

U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 36 Sup. Ct. 126, 60 L. ed. 324.

[11] Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; Rich v. St. Louis &c. R. Co., 166 Mo. App. 379, 148 S. W. 1011; Dooley v. Seaboard &c. R. Co., 163 N. Car. 454, 79 S. E. 970, Ann. Cas. 1915B, 598 n.

[12] St. Louis &c. R. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. ed. 1179; Charleston &c. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932; McAdow v. Kansas City &c. R. Co. (Mo. App.), 164 S. W. 188; Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328; Montgomery v. Southern Pac. Ry. Co., 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13 n.; Horton v. Oregon &c. R. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8 n.; Lauer v. Northern Pac. Ry. Co., 83 Wash. 465, 145 Pac. 606. But see Louisville &c. R. Co. v. Johnson, 161 Ky. 824, 71 S. W. 847; Louisville &c. R. Co. v. Winkler, 162 Ky. 843, 73 S. W. 151; Fish v. Chicago &c. R. Co., 263 Mo. 106, 172 S. W. 340, Ann. Cas. 1916B, 147 n. If they are conflicting, a state court will usually follow those appealing to be supported by the better reason. Ruck v. Chicago &c. Ry. Co., 153 Wis. 158, 140 N. W. 1074. As to procedure in state courts, not covered by the Act, the state courts will follow their own state rules.

[13] Charleston &c. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932; Louisville &c. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558; Neil v. Idaho &c. R. Co., 22 Idaho 74, 125 Pac. 331; South Covington &c. St. R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Long v. Southern R. Co., 155 Ky. 286, 159 S. W. 779. See also The Passaic, 190 Fed. 644, affd. in 204 Fed. 266; Chicago &c. R. Co. v. Bower, 241 U. S. 470, 36 Sup. Ct. 624, 60 L. ed. 1107; Nelson v. Southern Ry. Co., 246 U. S. 253, 38 Sup. Ct. 233, 62 L. ed. 699. And it is held that the statute does not

loquitur, is not applicable.[14] The Act of 1908 does not use the term "ways," which was used in the Act of 1906, and it may be argued from this that "ways" are not included; but it is difficult to think of anything included by that term that is not included within the broad and comprehensive terms of the last Act.[15] Many of the terms used have been construed as they occur in other statutes and we refer to some of the cases as tending to aid in the construction of the Federal Act;[16] but it is more comprehensive than most of the state statutes.

cover an action for wilful injury. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1 n., Ann. Cas. 1915B, 475 n.; Cincinnati &c. R. Co. v. Hill, 161 Ky. 237, 170 S. W. 599; Cincinnati &c. R. Co. v. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27. But it is said that the two clauses or branches in the first section of the Act relating to negligence, cover any and all negligence of which the carrier could have been held guilty at common law. De Atley v. Chesapeake &c. R. Co., 201 Fed. 591. The carrier is not, however, an insurer under the Act. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1 n., Ann. Cas. 1915B, 475 n; Seaboard Air Line Ry. Co. v. Moore, 228 U. S. 433, 33 Sup. Ct. 580, 57 L. ed. 907. And, as other cases, the negligence must be a proximate cause of the injury complained of and have relation to the employment and not be outside the scope thereof. See cases last above cited, and also Grand Trunk Ry. Co. v. Lindsay, 201 Fed. 836, affd. in 233 U. S. 42, 34 Sup. Ct. 581, 58 L. ed. 838, Ann. Cas. 1914C, 168; Union Pac. R. Co. v. Fuller, 204 Fed. 45; Martin v. Atchison &c. R. Co., 93 Kans. 681, 145 Pac. 849; Reeve v. Northern Pac. Ry. Co., 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 37 n.; Hobbs v. Great Northern &c. R. Co., 80 Wash. 678, 142 Pac. 20, L. R. A. 1915D, 503 n.

[14] Midland Val. R. Co. v. Fulgham, 181 Fed. 91. And see as to this being the general rule in the Federal courts as between master and servant, notes to Fitzgerald v. Southern R. Co., 6 L. R. A. (N. S.) 337, and Byers v. Carnegie Steel Co., 16 L. R. A. (N. S.) 214. But compare Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427; Ridge v. Norfolk So. R. Co., 167 N. Car. 510, 83 S. E. 762, L. R. A. 1915E, 215 n.; and see somewhat equivocal statement in Southern Ry. Co. v. Bennett, 233 U. S. 80, 34 Sup. Ct. 587, 58 L. ed. 860.

[15] As to what are "ways," see Philadelphia &c. R. Co. v. Tucker, 35 App. D. C. 123, L. R. A. 1915C, 39 n.

[16] As to "cars" and "trains," see ante, § 1947. As to appliances and machinery, see ante, § 1940. As to works and machinery, and the like, see Cleveland &c. R. Co. v. Austin, 127 Ill. App. 281 (scaffolding included); Morena v. Winston, 194

§ 1964. Provision against contract exempting from liability.—As already stated in effect, although the Act is in most respects prospective, it has been held that contracts exempting the carrier from liability are void even though entered into before its passage, and this includes relief department contracts.[17] This provision is not limited to such contracts as restrict the liability of the company, but, on the contrary, one thing which it "was intended to prevent was the use of this insurance, or relief, for which the employe himself has paid, in whole or in part, as a bar to the right which the statute has given him to recover damages from the corporation."[18] It is somewhat similar to provisions in other statutes that have been held constitutional and valid.[19]

§ 1965. Employes engaged in interstate commerce—Not essential that negligent employe should be.—The question as to just what and who are included by the expression, "any person suffering injury while he is employed by such carrier in such commerce," is not entirely free from difficulty. This expression in section 1 refers to commerce such as that first specified in the section; but it is not always easy to determine just what interstate commerce is and just when one may be regarded as employed by the carrier in such commerce. The question has

Mass. 378, 80 N. E. 473 (chains used on derrick included); Nichols v. Boston &c. R. Co., 206 Mass. 463, 92 N. E. 711 (loose staging used by car carpenters not included); Nappa v. Erie R. Co., 195 N. Y. 176, 88 N. E. 30, 21 L. R. A. (N. S.) 96 (skids used for unloading cars not included).

[17] Philadelphia &c. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; Burnett v. Atlantic &c. R. Co., 163 N. Car. 186, 79 S. E. 414. See also Baltimore &c. R. Co. v. Garvinske, 197 Fed. 31; Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867; Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

[18] McGuire v. Chicago &c. R. Co., 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706, 723, 724. See also Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

[19] See Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867, and ante § 1952. But compare Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 698.

arisen in a number of cases.[20] In one of the earlier cases it was held that where the company was carrying on both interstate and intrastate commerce an employe, engaged at the time in bridge construction on a track which was to be used for such commerce, was not engaged in interstate commerce within the Act.[21] But this decision was disapproved in several later Federal cases,[22] and was afterwards reversed by the Supreme Court of the United States.[23] It is established by these and

[20] As to what is interstate commerce, see Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914C, 159 n.; Rowlands v. Chicago &c. R. Co., 149 Wis. 51, 135 N. W. 156, Ann. Cas. 1916E, 714 n.; notes in 20 L. R. A. (N. S.) 49, and 41 L. R. A. (N. S.) 49. But compare Zachary v. North Carolina R. Co., 156 N. Car. 496, 72 S. E. 858. The railroad must be a common carrier. Shade v. Northern Pac. R. Co., 206 Fed. 353. See also Mondon v. New York &c. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44. And the statute has been held not to apply to a logging railroad which is not a common carrier. Bay v. Merrill R. Lumber Co., 211 Fed. 717, affd. in 220 Fed. 295; Nordgard v. Marysville &c. R. Co., 218 Fed. 737. Nor in the case of a cut-off not yet used in interstate traffic. Bravis v. Chicago &c. R. Co., 217 Fed. 234; Jackson v. Chicago &c. R. Co., 210 Fed. 495. And it seems that a street railway is not a railroad within the Act. Omaha &c. Ry. Co. v. Interstate Com. Com., 230 U. S. 324, 33 Sup. Ct. 890, 57 L. ed. 1501, 46 L. R. A. (N. S.) 385; McAdow v. Kansas City &c. Ry. Co. (Mo. App.), 164 S. W. 188. But it does apply to a branch road over which interstate traffic is carried. Smith v. Northern Pac. R. Co., 79 Wash. 448, 140 Pac. 685. And see United States v. Atlanta Terminal Co., 260 Fed. 779 (terminal company). And an electric railway transporting passengers and freight from points in one state to points in another, has been held engaged in interstate commerce. Humphrey v. Detroit &c. Ry. (Mich.), 180 N. W. 373; Atchison &c. R. Co. v. Victoria &c. R. Co., 234 U. S. 1, 34 Sup. Ct. 742, 58 L. ed. 1185 (tap line cases).

[21] Pedersen v. Delaware &c. R. Co., 184 Fed. 737. See also Pierson v. New York &c. R. Co., 83 N. J. L. 661, 85 Atl. 233.

[22] Lamphere v. Oregon R. &c. Co., 196 Fed. 336, 47 L. R. A. (N. S.) 1; Baltimore &c. R. Co. v. Darr, 204 Fed. 751, 47 L. R. A. (N. S.) 4; Horton v. Oregon R. &c. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

[23] Pedersen v. Delaware L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 153 n. But repairs upon an engine which is not at the time

other cases that an injured employe of an interstate carrier may be engaged in both kinds of commerce at the same time and that if he is injured while employed in interstate commerce, it is not essential under the Act that he or the carrier should be solely engaged in interstate commerce nor that the causal negligence should be that of a co-employe also employed in interstate commerce.[24] But if the injured employe is employed

used in interstate commerce and may or may not be so used in the future are to be distinguished from repairs upon a road permanently devoted to such commerce. Minneapolis &c. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 171, 61 L. ed. 358, Ann. Cas. 1918B, 54 n.

[24] Pedersen v. Delaware &c. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 153 n., and other cases cited in last preceding note. See also Mondou v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; Colasurdo v. Central R. Co., 180 Fed. 832, affd. in 192 Fed. 901; Zikos v. Oregon R. &c. Co., 179 Fed. 893; Fernette v. Pere Marquette R. Co., 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834; Watson v. St. Louis &c. R. Co., 169 Fed. 942; Montgomery v. Southern Pac. R. Co., 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13, Ann. Cas. 1914D, 678 n. The statute has been held applicable to a train of empty cars used in interstate traffic. North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914C, 159; to a train hauling the company's own coal from one state to another. McAdow v. Kansas City &c. R. Co. (Mo. App.), 164 S. W. 188; and to an interurban railroad crossing a state line. South Covington &c. R. Co. v. Covington, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. ed. 350, L. R. A. 1915F, 792 n. See also Louisville &c. R. Co. v. Allen, 152 Ky. 145, 153 S. W. 198, 152 Ky. 837, 154 S. W. 371, Ann. Cas. 1915B, 312 n.; Nashville &c. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554; Northern Pac. Ry. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237. So it has been held that it is not essential that a defective car or train which caused the injury should have been engaged in interstate commerce. Colasurdo v. Central R. Co., 180 Fed. 832, affd. in 192 Fed. 901; Kansas City &c. R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579. But compare as to empty cars, Patry v. Chicago &c. R. Co., 265 Ill. 310, 106 N. E. 843; Louisville &c. R. Co. v. Strange, 156 Ky. 439, 161 S. W. 239; Wright v. Chicago &c. R. Co., 94 Nebr. 317, 143 N. W. 220; Pennsylvania R. Co. v. Knox, 218 Fed. 748, with which compare, however, in addition to the Zachary case above cited, Kansas City R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579; Barker v. Kansas City &c. R. Co., 88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Thompson v. Wabash R. Co., 262 Mo. 468, 171 S. W. 364.

at the time in work which is wholly intrastate he is not within the statute although the carrier is also engaged in interstate commerce.[25]

§ 1966. What employes are included—Illustrative cases.—An employe engaged in running or in working on a train or car while it is used by his master, an interstate common carrier by railroad, in interstate commerce is clearly within the Act.[26] It

[25] Southern R. Co. v. Murphy, 9 Ga. App. 190, 70 S. E. 972. See also Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. ed. 1051, Ann. Cas. 1914C, 163; Illinois Cent. R. Co. v. Peery, 242 U. S. 292, 37 Sup. Ct. 122, 61 L. ed. 309; Barker v. Kansas City &c. R. Co., 88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Flanigan v. Hines (Kans.), 193 Pac. 765; Louisville &c. R. Co. v. Strange's Admx., 156 Ky. 439, 161 S. W. 239; Foley v. Hines (Maine), 111 Atl. 715; Wright v. Chicago &c. R. Co., 94 Nebr. 317, 143 N. W. 220; Missouri &c. R. Co. v. Hawley, 58 Tex. Civ. App. 143, 123 S. W. 726. In the recent case of Murray v. Pittsburg &c. R. Co., 263 Pa. 398, 107 Atl. 21, a brakeman engaged in switching an empty car in a private yard, was held not engaged in interstate commerce, where the train was local, even though there were several cars in the train consigned from points without the state to the owner of the yard, distinguishing New York &c. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. ed. 1298; Penna Co. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. ed. 139, and Louisville &c. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. ed. 119, and stating that while the test is whether the employe was, at the time of receiving the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of such traffic, the distinction is made between a mere expectation that the particular act done will be followed by other work of a different character and the doing of the act for the express purpose of furthering the transportation of interstate commerce. The test stated in this case is the general test suggested in several of the decisions of the Supreme Court of the United States already cited. See also Southern Pac. Co. v. Industrial Acc. Com., 251 U. S. 259, 40 Sup. Ct. 130.

[26] Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; Horton v. Seaboard &c. R. Co., 157 N. Car. 146, 72 S. E. 958; Rowlands v. Chicago &c. R. Co., 149 Wis. 51, 135 N. W. 156, Ann. Cas. 1916E, 714 and note; Southern R. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. ed. 402; Walsh v. New York &c. R. Co., 173 Fed. 494, affd. in Mondon v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44 (employe injured while replacing a drawbar on car which was being used in inter-

has also been held that a conductor is engaged in interstate commerce while walking back around his train inspecting it after going to the engine to give the engineer his clearance card, where such train is engaged in such commerce;[27] that a yard clerk while going through a railroad yard to meet an incoming interstate freight train to take down the number and initials on the cars is engaged in such commerce;[28] that a fireman who is killed in crossing a track at a station where he was ordered to report to relieve one of the crew of an interstate train is so engaged;[29] that an operator of a railroad pumping plant which furnishes water for interstate engines is within the Act while riding from his home to his work on a hand car furnished by the company for that purpose, where he is injured by employes in charge of an interstate train;[30] that an employe loading interstate freight in a car for interstate transportation is engaged in such commerce;[31] and that employes repairing

state commerce). See also Byram v. Illinois Cent. R. Co., 172 Iowa 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067 n.; Illinois Cent. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31. But see as to employe working on shop machine or the like, Illinois Cent. R. Co. v. Rogers, 221 Fed. 52; Minneapolis &c. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. ed. 358, Ann. Cas. 1918B, 1025 n.; Shanks v. Delaware &c. R. Co., 163 App. Div. 565, 148 N. Y. S. 1034. And compare Capps v. Atlantic Coast Line R. Co., 178 N. Car. 558, 101 S. E. 216, certiorari denied in 40 Sup. Ct. 345.

[27] Neil v. Idaho &c. R. Co., 22 Idaho 74, 125 Pac. 331.

[28] St. Louis S. F. & T. R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C, 156 n.

[29] Lamphere v. Oregon R. &c. Co., 196 Fed. 339, 47 L. R. A. (N. S.) 1.

[30] Horton v. Oregon R. &c. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8 (overruling Tsmura v. Great Northern R. Co., 58 Wash. 316, 108 Pac. 774). See also Lusk v. Bandy, 76 Okla. 108, 184 Pac. 144; Graber v. Duluth &c. R. Co., 159 Wis. 414, 150 N. W. 489. But compare Myers v. Norfolk &c. R. Co., 162 N. Car. 343, 78 S. E. 280, 48 L. R. A. (N. S.) 987.

[31] Illinois Cent. R. Co. v. Porter, 207 Fed. 311. See also Rich v. St. Louis &c. R. Co., 166 Mo. App. 379, 148 S. W. 1011; Barlow v. Lehigh Val. R. Co., 158 App. Div. 768, 143 N. Y. S. 1053 (in both of these cases switchmen were held so engaged while switching interstate cars). And compare Lammers v. Chicago &c. R. Co., 187 Iowa 1277, 175 N. W. 311; McAdoo v. McCoy (Tex. Civ. App.), 215 S. W. 870.

bridges or tracks on which both intrastate and interstate trains are run are likewise engaged in interstate commerce within the Act.[32] But liability under the Act does not extend to injury to an employe who is not at the time of the injury acting within the scope of his employment or performing some act incidental to such employment.[33] And a fireman, who was killed while aiding in moving several cars loaded entirely with intrastate freight, between two points in the same city, has been held not to be employed in interstate commerce within the Act although his employer was an interstate as well as an intrastate carrier.[34] It has also been held that a Pullman sleeping car porter is not an employe of the railroad company hauling the

[32] Pedersen v. Delaware &c. R. Co., 229 U. S. 146, 33 Sup. Ct. 651, 57 L. ed. 1125, Ann. Cas. 1914C, 153 n.; Thomson v. Columbia R. Co., 205 Fed. 203; Colasurdo v. Central R. Co., 180 Fed. 832, affd. in 192 Fed. 901; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; Jones v. Chesapeake R. Co., 149 Ky. 566, 149 S. W. 951. But compare Ruck v. Chicago &c. R. Co., 153 Wis. 158, 140 N. W. 1074. For additional cases in which the employe was held to be engaged in interstate commerce, see Illinois Cent. R. Co. v. Nelson, 203 Fed. 956; Deal v. Coal &c. R. Co., 215 Fed. 285; Thomas v. Boston &c. R. Co., 219 Fed. 180; Frazier v. Hines, 260 Fed. 874; St. Louis &c. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93; Louisville &c. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558; Barker v. Kansas City &c. R. Co., 88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Coons v. Louisville &c. R. Co., 185 Ky. 741, 215 S. W. 946; Winters v. Minneapolis &c. R. Co., 126 Minn. 260, 148 N. W. 106; Carr v. New York &c. R. Co., 77 Wis. 346, 136 N. Y. S. 501; Lloyd v. North Carolina R. Co., 162 N. Car. 485, 78 S. E. 489; Kansas City &c. R. Co. v. Pope (Tex. Civ. App.), 152 S. W. 185; Graw v. Oregon &c. R. Co., 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915B, 481. Employe of interstate railroad engaged in installing electric block system for intrastate commerce was held engaged in interstate commerce within the meaning of the Act in Saxton v. El Paso &c. R. Co. (Ariz.), 188 Pac. 257.

[33] Byram v. Illinois Cent. R. Co., 172 Iowa 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067n, and cases there cited; Hobbs v. Great Northern R. Co., 80 Wash. 678, 142 Pac. 20, L. R. A. 1915D, 503. See also Reeve v. Northern Pac. Ry. Co., 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 37.

[34] Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. ed. 1051, Ann. Cas. 1914C, 163 n. "The true test," says the court, quoting from a case already cited, always is: Is the work in question part of the interstate com-

car, so as to come within the provision invalidating contracts attempting to exempt the carrier from liability under the Act.[35] And it has likewise been held that an express messenger is not within the Act.[36] But the lessor of an intrastate railway is regarded as a common carrier by railroad engaging in commerce between the states, through its lessee where the latter is an interstate carrier and the lessor under the local law is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road; and in such a case a fireman killed while employed in interstate commerce by the lessee has been held entitled to recover against the lessor.[37]

merce in which the carrier is engaged?" See also Southern Ry. Co. v. Murphy, 9 Ga. App. 190, 70 S. E. 972; Patry v. Chicago &c. Ry. Co., 265 Ill. 310, 106 N. E. 843; Rockford City Trac. Co. v. Industrial Com., 295 Ill. 358, 129 N. E. 135; Wright v. Chicago &c. R. Co., 94 Nebr. 317, 143 N. W. 220; McAuliffe v. New York &c. R. Co., 150 N. Y. S. 512, 164 App. Div. 846; Hench v. Pennsylvania R. Co., 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915D, 557, Ann. Cas. 1916D, 230; Thomas v. Boston &c. R. Co., 218 Fed. 143; Loveless v. Louisville &c. R. Co., 199 Ala. 587, 75 So. 7; Karras v. Chicago &c. R. Co., 165 Wis. 578, 162 N. W. 923; for other cases in which an employe was held not within the statute.

[35] Robinson v. Baltimore & O. R. Co., 40 App. D. C. 160, L. R. A. 1915D, 511, (affd. in 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849). See also Martin v. New York &c. R. Co., 241 Fed. 696. But compare Oliver v. Northern Pac. R. Co., 196 Fed. 432.

[36] Higgins v. Erie R. Co., 89 N. J. L. 629, 99 Atl. 98; Missouri &c. R. Co. v. West, 38 Okla. 581, 134 Pac. 655; Missouri &c. R. Co. v. Blalack, 105 Tex. 296, 147 S. W. 559. But compare Wesseler v. Great Northern R. Co., 90 Wash. 234, 155 Pac. 1063, 157 Pac. 461; and see Wells Fargo &c. Co. v. Taylor (U. S.), 41 Sup. Ct. 93. And see as to employer of company handling U. S. mail, Zenz v. Industrial Acc. Com., 176 Cal. 304, 168 Pac. 364, L. R. A. 1918D, 423 n.; Lynch v. Boston &c. R. Co., 227 Mass. 123, 116 N. E. 401. See also to effect that the injured person must be an employe. Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778n; Ecclesine v. Great Northern Ry. Co. (Mont.), 194 Pac. 143; Fort Worth Belt Ry. Co. v. Perryman (Tex. Civ. App.), 158 S. W. 1181.

[37] North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914C, 159. See also Campbell v. Canadian &c. R. Co., 124 Minn. 245, 144 N. W. 772. But compare Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778 n.

§ 1967. **Assumption of risks.**—There has been considerable difference of opinion as to when, if at all, the defense of assumption of risks is open to the defendant under the Act. Some courts seem to have regarded it as abolished entirely.[38] Other courts, more reasonably, have held that it is not abrogated except where a violation of a statute intended for the safety of employes has contributed to the injury or death of the employe.[39] But most of them do not, at least in terms, limit their statement to federal statutes. The question may now, however, be regarded as settled by a recent decision of the Supreme Court of the United States.[40] It is there held that the phrase "any statute enacted for the safety of employes," was intended to include only Federal statutes, such, for instance, as the Federal Safety Appliance Acts, and that, with

[38] See Philadelphia &c. R. Co. v. Tucker, 35 App. D. C. 123, L. R. A. 1915C, 39 n.; Wright v. Yazoo &c. R. Co., 197 Fed. 94; Sandidge v. Atchison &c. Ry. Co., 193 Fed. 867; Malloy v. Northern Pac. Ry. Co., 157 Fed. 1019. These courts fail to make the distinctions between contributory negligence and assumption of risks. Where a yard conductor was injured by coming in contact with a bridge while on top of an unusually high car, it was held that whether the risk was incident to his employment or so obvious to him that he must be deemed to have assumed it was for the jury, and that if the failure to exclude such car from the train or to caution him regarding the height was due to negligence of fellow servants the company could not say, under the Employers' Liability Act, that he assumed the risk from such causes. Portland Terminal Co. v. Jarvis, 227 Fed. 8. See also Byram v. Illinois Cent. R. Co., 172 Iowa 631, 154 N. W. 1006, Ann. Cas. 1918A. 1067 n. (risk from negligence of fellow servant not assumed).

[39] Central Vt. R. Co. v. Bethune, 206 Fed. 868; New York &c. R. Co. v. Vizvari, 210 Fed. 118, L. R. A. 1915C, 9; Delaware &c. R. Co. v. Tomasco, 256 Fed. 14; Neil v. Idaho &c. R. Co., 22 Idaho 74, 125 Pac. 331; Southern R. Co. v. Howerton, 182 Ind. 208. 105 N. E. 1025, 106 N. E. 369; Barker v. Kansas City &c. R. Co., 88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121. See also Guana v. Southern Pac. Ry. Co., 15 Ariz. 413. 139 Pac. 782; Farley v. New York &c. R. Co., 87 Conn. 328, 87 Atl. 990; Chesapeake &c. R. Co. v. Walker's Admx., 159 Ky. 237, 167 S. W. 128; Oberlin v. Oregon &c. R. & Nav. Co., 71 Ore. 177, 142 Pac. 554; Ft. Worth &c. R. Co. v. Copeland (Tex. Civ. App.), 164 S. W. 857.

[40] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

this exception; assumption of risks is a defense the same as it was before the passage of the Act.[41]

[41] See also Southern R. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. ed. 1564; Boldt v. Pennsylvania R. Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. ed. 385; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369. Neither assumption of risks nor contributory negligence is a defense where the injury arises from a violation of the Federal Safety Appliance Act. Thornbro v. Kansas City &c. Ry. Co., 91 Kans. 684, 139 Pac. 410, Ann. Cas. 1915D, 314 n. See also LaMere v. Ry. Transfer Co., 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667 n. (there is no assumption of risks as matter of law, but a brakeman assumes danger of ordinary bumping of cars attendant upon their usual and proper operation). And assumption of risks is held not to be a defense where the injury is caused by violation of the Federal Hours of Service Act. Schweig v. Chicago &c. Ry. Co., 216 Fed. 750, affirming 205 Fed. 96; Baltimore &c. R. Co. v. Wilson, 242 U. S. 295, 37 Sup. Ct. 123, 61 L. ed. 312. But not unless such violation contributes to the injury. Atchison &c. R. Co. v. Swearingen, 239 U. S. 339, 36 Sup. Ct. 121, 60 L. ed. 317. The doctrine of assumption of risks is to be applied in action under the Federal Statute as construed and determined by the Federal courts. Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C. 1 n., Ann. Cas. 1915B, 475 n.; Seaboard Air Line Ry. Co. v. Moore, 228 U. S. 433, 33 Sup. Ct. 580, 57 L. ed. 907; Glenn v. Cincinnati &c. R. Co., 157 Ky. 453, 163 S. W. 461; Freeman v. Powell (Tex. Civ. App.), 144 S. W. 1033. But see Fish v. Chicago &c. R. Co., 263 Mo. 106, 172 S. W. 340, Ann. Cas. 1916B, 147 n. In the first of the cases last above cited and in Gila &c. R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. ed. 521, the doctrine as it exists and is applied in the Federal courts, and in most of the state courts at common law, is fully stated and explained. See also Schlemmer v. Buffalo &c. R. Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. ed. 596; Southern Ry. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99 and Federal cases there reviewed. Violation of a rule of the master is contributory negligence, where, it is a proximate cause of the injury, rather than assumption of risks. Oberlin v. Oregon &c. Nav. Co., 71 Ore. 177, 142 Pac. 554; Carter v. Kansas City St. Ry. Co. (Tex. Civ. App.), 155 S. W. 638. For cases in which the risk was held assumed so as to prevent recovery, see Pryor v. Williams (U. S.), 41 Sup. Ct. 36; Farley v. New York &c. R. Co., 87 Conn. 328, 87 Atl. 990; Helm v. Cincinnati &c. R. Co., 156 Ky. 210, 160 S. W. 945; Schweig v. Chicago &c. Ry. Co., 216 Fed. 750. For cases in which it was held not assumed, see Gila Valley R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. ed. 521; Chicago &c. Ry. Co. v. Ward (U. S.), 40 Sup. Ct. 275; Pennsylvania R. Co. v. Goughnow, 208 Fed. 961; Vickery v. New London &c. R. Co., 87 Conn. 634, 89 Atl. 277.

§ 1968. **Contributory negligence.**—The Federal Employers' Liability Act also provides that contributory negligence shall not be a defense under the Act where the violation of such a statute contributes to the injury or death of the employe, and in cases not in that category there is also a limitation upon the effect that is to be given to contributory negligence.[42] The question of contributory negligence in such cases, is held in several decisions to be necessarily one for the jury.[43] And it is also held that it is only when the plaintiff's negligence is the sole cause of the injury—when defendant's alleged negligence is no part of the causation—that plaintiff's negligence can entirely defeat a recovery.[44] In other words, even though the defendant's negligence exceeds that of the plaintiff it will not entirely defeat a recovery as matter of law and the case must be left to the jury.[45]

[42] Seaboard Air Line R. Co. v. Horton, 233 U. S. 49, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, 7, Ann. Cas. 1915B, 475 n. See also Charleston &c. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932; Missouri &c. R. Co. v. Bunkley (Tex. Civ. App.), 153 S. W. 937.

[43] Sandidge v. Atchison &c. Ry. Co., 193 Fed. 867; Chicago &c. R. Co. v. McCormick, 200 Fed. 375, 47 L. R. A. (N. S.) 18; Horton v. Seaboard &c. R. Co., 157 N. Car. 146, 72 S. E. 958 (reversed on other grounds by Supreme Court of United States in decision referred to in preceding note). See also Portland Terminal Co. v. Jarvis, 227 Fed. 8. As to what is contributory negligence and the distinction between it and assumption of risks see first case cited in last preceding note, and Norfolk &c. R. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172.

[44] Grand Trunk &c. R. Co. v. Lindsay, 201 Fed. 836; Louisville &c. R. Co. v. Wene, 202 Fed. 887; Pennsylvania Co. v. Cole, 214 Fed. 948. See also Chicago &c. R. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. ed. 431. In the following cases recovery was denied, because, under the facts, the plaintiff's own act was regarded as the sole cause of the injury. Ellis v. Louisville &c. R. Co., 155 Ky. 745, 160 S. W. 512; Pankey v. Atchison &c. R. Co., 180 Mo. App. 185, 168 S. W. 274. In the first two cases cited in the next following note, as well as in most of the others already cited, a recovery was held permissible because the defendant was also guilty of negligence which was a part of the causation.

[45] See New York &c. R. Co. v. Niebel, 214 Fed. 952; Louisville &c. R. Co. v. Heinig, 162 Ky. 14, 171 S. W. 853; Chicago &c. Ry. Co. v. McCormick, 200 Fed. 375, 47 L. R. A. (N. S.) 18, and compare Fogarty v. Northern Pac. R. Co., 74 Wash. 397, 133 Pac. 609. The Act

§ 1969. Comparative negligence.—The generally discarded doctrine of comparative negligence is re-established in one form under the Federal Employers' Liability Act.[46] Section 3 provides that contributory negligence of the injured employe shall not bar a recovery, in other cases than the violation of a statute for the safety of employes, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. This is one of the most radical changes in the law, and there has been some difficulty in applying it. It means that where the causal negligence is partly attributable to the employe and partly to the carrier, the former shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.[47] The negligence of the employe goes only to a diminution of the damages.[48] The jury should be instructed accordingly,[49] and told how to apply the provision as the Act requires. But it has been held that only such negligence as

does not afford relief where the plaintiff's injury is due solely to his own negligence and recklessness. Virginia Ry. Co. v. Linhaus, 230 Fed. 88.

[46] Mondon v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; Seaboard Air Line Ry. Co. v. Tilghman, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. ed. 1069.

[47] Norfolk & W. R. Co. v. Earnest. 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172 n.; Illinois Cent. R. Co. v. Skaggs, 240 U. S. 661, 36 Sup. Ct. 249, 60 L. ed. 528; Shanley v. Philadelphia &c. R. Co., 221 Fed. 1012; Cincinnati &c. R. Co. v. Gross. 186 Ind. 471, 114 N. E. 962; O'Neill v. Erie R. Co., 182 N. Y. App. Div. 729, 169 N. Y. S. 1008.

[48] Cain v. Southern Ry. Co., 199 Fed. 211; Neil v. Idaho &c. R. Co., 22 Idaho 74, 125 Pac. 331; McDonald v. Railway &c. Trans. Co., 121 Minn. 273, 141 N. W. 177; Atchison &c. R. Co. v. Tack, 61 Tex. Civ. App. 551, 130 S. W. 596. And even to do this it must be a proximate cause. Illinois Cent. R. Co. v. Porter, 207 Fed. 311; Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249. 60 L. ed. 528; Southern R. Co. v. Peters, 194 Ala. 94. 69 So. 611.

[49] See Louisville &c. R. Co. v. Wene, 202 Fed. 887; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Fleming v. Norfolk &c. R. Co., 160 N. Car. 196. 76 S. E. 212; Weina v. Pennsylvania Co., 251 Pa. 213, 96 Atl. 461, and post, section on Damages.

proximately contributes to the injury is to be considered.[50] And, as already indicated, where the sole ground for recovery is a violation of the Federal Safety Appliance Act by the carrier contributory negligence can not be relied on by the carrier for any purpose.[51]

§ 1970. Survival of right of action—Two distinct causes of action.—The Act in question provides for two distinct causes of action—one by the injured employe himself where death does not result, and one to his personal representatives for the benefit of certain designated beneficiaries where death does result.[52] As originally passed, it made no provision for survival of the right or cause of action of the injured employe.[53] Section 9 aided by the amendment, however, provides that the right of action shall survive but there shall be only one recovery for the same injury. Even if this gives a right of action for injury sustained by the employe as well as for death, the party who must bring or continue the action is the same, namely, the personal representative, and it is for the same beneficiaries and

[50] Illinois Cent. R. Co. v. Porter, 207 Fed. 311.

[51] Burho v. Minneapolis &c. R. Co., 121 Minn. 326, 141 N. W. 300; Johnson v. Great Northern Ry. Co., 178 Fed. 643. See also St. Louis &c. R. Co. v. Anderson, 117 Ark. 41, 173 S. W. 834; Thornbro v. Kansas City &c. Ry. Co., 91 Kans. 684, 139 Pac. 410, Ann. Cas. 1915D, 314 n.; Spokane &c. R. Co. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. ed. 1125; Grand Trunk &c. R. Co. v. Linsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. ed. 838, Ann. Cas. 1914C, 168 n.

[52] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176 n. (and the right of action for death is not limited to cases in which death is instantaneous); Garrett v. Louisville &c. R. Co., 235 U. S. 308, 35 Sup. Ct. 32, 59 L. ed. 242; Thomas v. Chicago &c. R. Co., 202 Fed. 766; McCoullough v. Chicago &c. R. Co., 160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23 n. (not for survival but a new cause of action for death in favor of the beneficiaries).

[53] See cases cited in last preceding note, also New York &c. R. Co. v. Walsh, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; American R. Co. v. Didrickson, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. ed. 456, Ann. Cas. 1914C, 128 n.; St. Louis, I. M. & S. R. Co. v. Hesterley, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031 (and in the action for death no recovery could be had for pain suffered by the deceased).

not the estate of the deceased.[54] Although there can be but one recovery for them, it has been held that, where death is not instantaneous, it may include damages for pain and suffering of the injured employe, under this amendment, as well as damages for the pecuniary loss to the beneficiaries.[55]

§ 1971. Whether death is instantaneous as affecting action for beneficiaries.—It is held under the Act as originally passed that an action may be maintained for the beneficiaries for damages resulting to them from the death of the injured employe caused by the negligence of the carrier whether death is instantaneous or not.[56] But, under the amendment, the provision for survival has been held to create no new cause of action and to have no application where death is instantaneous.[57]

§ 1972. Beneficiaries.—There can be no recovery for the death of the employe unless there is in existence some one or more of the designated beneficiaries.[58] And the existence of

[54] Melzner v. Northern Pac. R. Co., 46 Mont. 277, 127 Pac. 1002. See also Pecos &c. R. Co. v. Rosenbloom, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. ed. 730; St. Louis &c. Ry. Co. v. Smitha (Tex. Civ. App.), 190 S. W. 237.

[55] St. Louis &c. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93. See also Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 37 Sup. Ct. 41, 61 L. ed. 208, L. R. A. 1917E, 1050; Gulf &c. R. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785; St. Louis &c. R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160, where, referring to the clause that "in such cases there shall be only one recovery for the same injury," the court said.

[56] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176.

[57] Carolina &c. Ry. Co. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605n., affd. in 239 U. S. 630, 36 Sup. Ct. 166, 60 L. ed. 476, citing and reviewing many decisions under state statutes providing for survival. See also Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144, 149 N. W. 14; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160; New Orleans &c. R. Co. v. Harris, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. ed. 1167; Norfolk &c. R. Co. v. Holbrook, 235 U. S. 625, 35 Sup. Ct. 143, 59 L. ed. 392 (where death is instantaneous only pecuniary loss can be recovered).

[58] Seaboard Air Line Ry. Co. v. Kenney, 240 U. S. 489, 36 Sup. Ct. 458, 60 L. ed. 762; Thomas v. Chicago &c. R. Co., 202 Fed. 766; McCullough v. Chicago &c. R. Co.,

one class excludes the lower classes.[59] It has also generally been held, under somewhat similar statutes, that the failure of the beneficiaries of the higher class in existence to bring any action will not operate to transfer the right of action to those of the lower classes.[60] The beneficiary must have suffered some pecuniary loss, or there can be no recovery.[61] And it is held

160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23, 26; Melzner v. Northern Pac. R. Co., 46 Mont. 277, 127 Pac. 1002. No damages can be recovered for the estate: Southern Ry. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Chesapeake &c. R. Co. v. Dwyer's Admx., 157 Ky. 590, 163 S. W. 752. Alien parents may recover in a proper case. McGovern v. Philadelphia &c. R. Co., 235 U. S. 389, 35 Sup. Ct. 127, 59 L. ed. 283; Bombolis v. Minneapolis &c. R. Co., 128 Minn. 112, 150 N. W. 385. It has been held by a divided court that the term "next of kin" as used in the first section of the Act includes an illegitimate child and that an action could be maintained by an administrator for the death of such child, whose mother was dead, for the benefit of the mother's legitimate children who were dependent upon such deceased child. Kenney v. Seaboard Air Line Ry. Co., 167 N. Car. 14, 82 S. E. 968, Ann. Cas. 1916E, 450 n.; but the majority of the court seem to have been influenced by a state statute, and in Kentucky there is a decision to the contrary effect. Cincinnati &c. R. Co. v. Wilson's Admx., 157 Ky. 460, 163 S. W. 493, 51 L. R. A. (N. S.) 308 n. Compare also Taylor v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. ed. 638.

[59] McCullough v. Chicago &c. R. Co., 160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23; In re Stone, 173 N. Car. 208, 91 S. E. 852; St. Louis &c. R. Co. v. Geer (Tex. Civ. App.), 149 S. W. 1178. The mother of the intestate has been held not entitled to share in the damages where he left a widow. Goen v. Baltimore &c. R. Co., 179 Ill. App. 566; St. Louis &c. R. Co. v. Geer (Tex. Civ. App.), 149 S. W. 1178.

[60] Hammond v. Lewiston &c. St. R. Co., 106 Maine 209, 76 Atl. 672, 30 L. R. A. (N. S.) 78 n.; Belding v. Black Hills &c. R. Co., 3 S. Dak. 369, 53 N. W. 750. See also Louisville &c. R. Co. v. Jones, 45 Fla. 407, 34 So. 246; Dillier v. Cleveland &c. R. Co., 34 Ind. App. 52, 72 N. E. 271; Doyle v. Baltimore &c. R. Co., 81 Ohio St. 184, 90 N. E. 165, 135 Am. St. 775; Louisville &c. R. Co. v. Bean, 94 Tenn. 388, 29 S. W. 370. But compare Morris v. Spartanburg Ry. &c. Co., 70 S. Car. 279, 49 S. E. 854.

[61] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C. 176 n.; Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 37 Sup. Ct. 41, 61 L. ed. 208, L. R. A. 1917E, 1050; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785; Illinois Cent. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31. See also Garrett v. Louisville &c.

that there is no presumption of pecuniary loss, without proof, to parents or next of kin.[62]

§ 1973. Jurisdiction.—The Federal courts have jurisdiction of cases under the statute even though there is no diversity of citizenship.[63] Under the Act as originally passed it was held that the action in a Federal Court could be brought only in the district of which the defendant was an inhabitant;[64] but the amendment of 1910 changes this rule and provides that the action may be brought in the circuit (now district) court of the United States in the district of the residence of the defendant or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action.[65] The courts of the several states also are given concurrent jurisdiction with that of the Federal courts, and it is provided that no case arising under the Act, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States.[66]

R. Co., 235 U. S. 308, 35 Sup. Ct. 32, 59 L. ed. 242.

[62] Gulf &c. R. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785; Illinois Cent. R. Co. v. Porter, 207 Fed. 311; Garrett v. Louisville &c. R. Co., 197 Fed. 715 (holding evidence sufficient, however, to make a prima facie case of pecuniary loss susceptible of estimate); McCullough v. Chicago &c. R. Co., 160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23; Griffith v. Midland Valley R. Co., 100 Kans. 500, 166 Pac. 467; Nashville &c. R. Co. v. Anderson, 134 Tenn. 666, 185 S. W. 677, Ann. Cas. 1917D, 902; Carolina &c. Ry. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605. See also as to what is sufficient. Dooley v. Seaboard &c. R. Co., 163 N. Car. 254, 79 S. E. 970.

[63] Cound v. Atchison &c. R. Co., 173 Fed. 527; Clark v. Southern R. Co., 175 Fed. 122. See also Missouri K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134.

[64] Newell v. Baltimore &c. R. Co., 181 Fed. 698; Smith v. Detroit &c. R. Co., 175 Fed. 506.

[65] The plaintiff may have his choice. Connelly v. Central R. Co., 238 Fed. 932; Hogan v. New York &c. R. Co., 223 Fed. 890; Illinois Cent. R. Co. v. Rogers, 221 Fed. 52. The Judicial Code (Act of March 3, 1911) abolished circuit courts and gave the district courts jurisdiction, 36 Stat. at Large 1167, Barnes Fed. Code § 1066 et seq.; Jud. Code § 289 et seq.

[66] The statute expressly so provides, and among the many decisions holding that the action may

§ 1974. Removal of cause to Federal court—Waiver.—There was some difference of opinion as to the right of removal prior to the amendment of 1910. But such amendment and § 28 of the Judicial Code of March 3, 1911, containing a similar provision prohibiting the removal of any case arising under the Federal Employers' Liability Act, have settled the question where the case arises and is brought under this Act.[67] There may, however, be a question in some cases, as to whether they arose under the act within the meaning of this provision,[68] and it has been held that, as the provision against removal is for the

be brought in a state court having adequate jurisdiction are the following: Mondon v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; Southern R. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. ed. 402; Atlantic Coast Line R. Co. v. Whitney, 62 Fla. 124, 56 So. 937; Bradbury v. Chicago &c. R. Co., 149 Iowa 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684, and note citing other authorities to the same effect. As to review of judgment of state supreme court by United States Supreme Court on writ of error, and what must be shown, see St. Louis &c. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 53 L. ed. 1061; Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477, 32 Sup. Ct. 790, 56 L. ed. 1171; St. Louis &c. Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. ed. 1179; Wabash R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. ed. 1226 (power to review does not extend to merely incidental questions not federal); St. Louis &c. Ry. Co. v. Hesterley, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031 (but the holding of state supreme court that Federal question is involved and its decision by that court is conclusive that it was sufficiently presented); Seale v. St. Louis &c. R. Co., 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C, 156 n. As to effect of amendatory act of September 6, 1916, substituting certiorari for writ of error, see Philadelphia & R. Coal &c. Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. ed. 221.

[67] Kansas City So. R. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. ed. 1478; Southern R. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. ed. 402; Strauser v. Chicago &c. R. Co., 193 Fed. 293; Hulac v. Chicago &c. Ry. Co., 194 Fed. 293; McChesney v. Illinois Cent. R. Co., 197 Fed. 85; Kelley v. Chesapeake &c. R. Co., 201 Fed. 602; Rice v. Boston &c. R. Co., 203 Fed. 580; Lloyd v. North Carolina R. Co., 162 N. Car. 485, 78 S. E. 489.

[68] See and compare Thomas v. Chicago &c. R. Co., 202 Fed. 766; Kelly v. Chesapeake &c. Ry. Co., 201 Fed. 602; De Alley v. Chesapeake &c. R. Co., 201 Fed. 591; Stafford v. Norfolk &c. Ry. Co., 202 Fed. 605; Ullrich v. New York &c. R. Co., 193 Fed. 768; Rice v. Boston &c. R. Co., 203 Fed. 580;

benefit of the plaintiff, he may waive the prohibition.[69] But the contrary has also been held.[70]

§ 1975. Limitation as to time of instituting action.—The Act expressly provides that no action shall be maintained under it unless commenced within two years from the day the cause of action accrued. It has been a disputed question as to whether this is a mere limitation or a condition inherent in or annexed to the right of action, and it has been held by a state [illegible] it is a mere statute of limitation and must be pleaded by the defendant.[71] But it now seems to be settled by the Supreme Court of the United States that the limitation inheres in the right and does not relate merely to the remedy.[72] Where an action is brought by a sole surviving parent in her individual capacity, the amendment of her complaint or petition so as to set out for the first time the right to sue as personal representative, without stating any new facts as ground of action, has been held not to be the commencement of a new action in determining whether the action was commenced within the two years period of limitation.[73] But it is a disputed question

Flas v. Illinois Cent. R. Co., 229 Fed. 319; Strother v. Union Pac. R. Co., 220 Fed. 731. As will be seen from the above cases there is considerable difference of opinion as to the rule, especially where a cause of action is stated under both state law and the Federal Act in question.

[69] Stephens v. Chicago &c. Ry. Co., 206 Fed. 854. See also Thomas v. Chicago &c. Ry. Co., 202 Fed. 766; Garrett v. Louisville &c. R. Co., 197 Fed. 715.

[70] Patton v. Cincinnati &c. Ry. Co., 208 Fed. 29.

[71] Burnett v. Atlantic &c. R. Co., 163 N. Car. 186, 79 S. E. 414. But compare post. § 2061; Martin v. Pittsburg Ry. Co., 227 Pa. St. 18, 75 Atl. 837, 26 L. R. A. (N. S.) 1221 and note. As to when cause of action for death accrues and when it is barred, see generally: German Am. Trust Co. v. Lafayette &c. Co., 52 Ind. App. 211, 98 N. E. 874; Louisville &c. R. Co. v. Simrall, 31 Ky. L. 1269, 104 S. W. 1011; Shannon v. Boston &c. R. Co., 77 N. H. 349, 92 Atl. 167; Altzheimer v. Central R. Co., 75 N. J. L. 424, 67 Atl. 1051; Seaboard Air Line R. Co. v. Allen, 192 Fed. 480.

[72] Seaboard Air Line Ry. Co. v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. ed. 1066, Ann. Cas. 1917C, 487; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 36 Sup. Ct. 75, 60 L. ed. 226.

[73] Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B,

as to whether an amendment of a complaint based solely on the common law or a state statute and not stating a cause of action under the Federal Employers' Liability Act constitutes a new action which cannot be brought after the time limited by said act.[73a]

§ 1976. Parties.—In case of death of the injured employe the action must be brought by the personal representative and not by any of the beneficiaries in their own names either for themselves or for others as well.[74] It has been held, correctly as we think, that an administrator may be appointed for the sole purpose of bringing the action even though there is no other estate.[75] And it has also been held than an ancillary adminis-

134. See also Wilson v. Denver &c. R. Co. (Colo.), 187 Pac. 1027. But compare Eastern R. Co. v. Ellis (Tex. Civ. App.), 153 S. W. 701. See generally as to what does or does not amount to the commencement of a new action, notes in 3 L. R. A. (N. S.) 259, and 33 L. R. A. (N. S.) 196.

[73a] The authorities are reviewed in the principal and dissenting opinions on Hogarty v. Philadelphia &c. Ry. Co., 255 Pa. St. 236, 99 Atl. 741, and in the note thereto in 8 A. L. R. 1356. The opinion of the Supreme Court of the United States in Seaboard Air Line R. Co. v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. 567, seems to lend some support to the decisions of the Pennsylvania court to the effect that such amendment can not be made after the period of limitations has run. But other Federal decisions render it doubtful. See St. Louis &c. R. Co. v. Smith, 243 U. S. 630, 61 L. ed. 938, 37 Sup. Ct. 477; Missouri &c. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B, 134; Smith v. Atlantic Coast Line R. Co., 210 Fed. 761, 127 C. C. A. 311.

[74] American R. Co. v. Birch, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. ed. 879; Missouri K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134 n.; Thompson v. Wabash R. Co., 184 Fed. 554; Missouri &c. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383 (can not be waived); Eastern R. Co. v. Ellis (Tex. Civ. App.), 153 S. W. 701; Kansas City &c. R. Co. v. Pope (Tex. Civ. App.), 152 S. W. 185; Gulf &c. R. Co. v. Lester (Tex. Civ. App.), 149 S. W. 841 (not waived by first answering to the merits); St. Louis &c. R. Co. v. Brothers (Tex. Civ. App.), 165 S. W. 488 (personal representative the only proper person to revive).

[75] Eastern R. Co. v. Ellis (Tex. Civ. App.), 153 S. W. 701; Gulf &c. R. Co. v. Beezley (Tex. Civ. App.), 153 S. W. 651; Rivera v. Atchison &c. R. Co. (Tex. Civ. App.), 149 S. W. 223. See also Southern Pac.

trator may sue in a proper case.[76] The negligent co-employe is not liable under the Act and should not be joined as a defendant in an action based thereon.[77]

§ 1977. Right to prosecute as poor person.—Under an Act of Congress permitting a party to sue or defend as a poor person, the plaintiff, in a case brought under the Employers' Liability Act in a Federal Court, may obtain an order of the court permitting him to commence and prosecute the action without being required to prepay fees and costs where he files in said court a written statement under oath that because of his poverty he is unable to pay the costs of said action or to give security for the same and believes that he is entitled to the redress he seeks by such action, and setting forth briefly the nature of his alleged cause of action.[78] Statutes in most of the states also make similar provision for the prosecution of actions by poor persons, and, we suppose that where a case under the Employers' Liability Act is brought in a state court the plaintiff may obtain the right to prosecute it as a poor person in that court by complying with the state statute upon the subject.[79]

§ 1978. Pleading and practice.—The statute does not attempt to prescribe rules of pleading and practice further than has already been stated, and the rules of practice of the court in which the action is brought together with the ordinary rules of pleading and evidence should usually be followed, we sup-

Co. v. Da Valle Da Costa, 190 Fed. 689; Howard v. Nashville &c. R. Co., 133 Tenn. 19, 179 S. W. 380, Ann. Cas. 1917A, 844.

[76] Anderson v. Louisville &c. R. Co., 210 Fed. 689. See as to when personal representative appointed in one state can sue another. Baltimore &c. R. Co. v. Evans, 188 Fed. 6; Midland Val. R. Co. v. Le Moyne, 104 Ark. 327, 148 S. W. 654; Hall v. Southern R. Co., 146 N. Car. 345, 59 S. E. 879.

[77] Taylor v. Southern R. Co., 178 Fed. 380; Kelly v. Chesapeake &c. R. Co., 201 Fed. 602.

[78] Act of Congress June 25, 1910, C. 435, Barnes' Fed. Code, § 1367. The provision of this act includes writ of error and appeal.

[79] It is held in Going's Admx. v. Norfolk &c. R. Co., 119 Va. 543, 89 S. E. 914, that the Federal statute above referred to has no application to an action in the state court under the Federal act.

pose, as in other cases.[80] But the question as to whether there is sufficient evidence to require the case to be submitted to the jury, or to be decided by the court as one of law on demurrer to the evidence or the like is a question involving substantive rights rather than mere procedure and is determined by controlling decisions of the federal courts and not by the laws or decisions of the particular state.[81] The complaint or

[80] See Kansas City &c. R. Co. v. Leslie, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834 n. (rule of evidence); Brinkmeier v. Missouri Pac. Ry. Co., 224 U. S. 268, 32 Sup. Ct. 412, 56 L. ed. 758; Cincinnati &c. R. Co. v. Swann's Admx., 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27n; Bennett v. Southern Ry. &c. Div.(S. Car.), 79 S. E. 710. Thus, questions as to permitting amendments as to rules of evidence, variances, and the like have been held matters to be determined by the state courts in accordance with the state laws and practice. Wabash R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. ed. 1227; Kansas City &c. R. Co. v. McAdow, 240 U. S. 51, 36 Sup. Ct. 252, 60 L. ed. 520; Southern Ry. Co. v. Bennett, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. ed. 860; Midland Val. R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 215; Louisville &c. R. Co. v. Moore, 156 Ky. 708, 161 S. W. 1129; Tinkham v. Boston &c. R. Co., 77 N. H. 111, 88 Atl. 709; Mulligan v. Atlantic &c. R. Co., 104 S. Car. 173, 88 S. E. 445; Bouchard v. Central Vt. R. Co., 87 Vt. 399, 89 Atl. 475, L. R. A. 1915C, 33 n.; Sweet v. Chicago &c. R. Co., 157 Wis. 400, 147 N. W. 1054. See also Gibson v. Bellingham &c. Ry. Co., 213 Fed. 488; Lee v. Central of G. R. Co. (U. S.), 40 Sup. Ct. 254 (state law as to joinder of parties and causes in a single count affects only the remedy and governs); Chesapeake &c. R. Co. v. Omaha, 241 U. S. 241, 36 Sup. Ct. 594 (state law permitting verdict by fewer than 12 jurors is applicable). But a state statute requiring notice of the injury is not applicable. El Paso &c. Ry. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106. See generally for various points of procedure and evidence that have arisen in actions under the statute. Charleston &c. R. Co. v. Brown, 11 Ga. App. 493, 75 S. E. 826; Devine v. Chicago &c. R. Co., 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1914B, 481n. (parol proof of cars being engaged in interstate commerce); Helm v. Cincinnati &c. R. Co., 156 Ky. 249, 160 S. W. 945; Fleming v. Norfolk &c. R. Co., 160 N. Car. 196, 76 S. E. 212; Irvin v. Southern R. Co., 164 N. Car. 5, 80 S. E. 78, Ann. Cas. 1915D, 54 n.; Pfeiffer v. Oregon &c. Nav. Co., 74 Ore. 307, 144 Pac. 762 (oral evidence not best evidence as to interstate shipments and may be excluded). Donaldson v. Great Northern Ry. Co., 89 Wash. 161, 154 Pac. 133 (verdict by ten jurors in state court when authorized by state law).

[81] St. Louis &c. Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct.

declaration must state facts sufficient to bring the case within the statute. It must show, for instance, that the defendant is a common carrier engaged in interstate commerce,[82] and, if based on the death of the employe, it must show the existence of some beneficiary of a class designated by the statute.[83] The courts, however, are bound to take judicial notice of the Federal statute, and it is not necessary that it should be pleaded or expressly mentioned in the complaint, if the facts alleged are sufficient to bring the case within such statute and constitute a course of action thereunder.[84] It seems that courts at common law and under the Federal statute may be joined in an action to recover for negligent injury to the employe and

858, 57 L. ed. 1179. But compare Marshall v. Chicago &c. R. Co., 133 Minn. 460, 157 N. W. 638. In Baltimore &c. R. Co. v. Wheeler (Ind. App.), 129 N. E. 40, it is held that the Indiana statute making contributory negligence a matter of defense and placing the burden of proof on the defendant governs, but the effect of contributory negligence, where established, is controlled by the federal law. But compare New Orleans &c. R. Co. v. Harris, 247 U. S. 367, 62 L. ed. 1167, 38 Sup. Ct. 535, 536; Berry v. Chicago &c. R. Co. (Mo.), 208 S. W. 622, as to burden of proof.

[82] Walton v. Southern Ry. Co., 179 Fed. 175; Shade v. Northern Pac. Ry. Co., 206 Fed. 353. And that the plaintiff, or decedent, was employed by defendant therein. North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914C, 159 n.; Chicago &c. R. Co. v. McBee, 45 Okla. 192, 145 Pac. 331. See also Seaboard Air Line Co. v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. ed. 1006, Ann. Cas. 1917C, 487; Illinois Cent. R. Co. v. Rogers, 221 Fed. 52.

[83] Thomas v. Chicago &c. Ry. Co., 262 Fed. 766; Illinois Cent. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; Melzner v. Northern Pac. R. Co., 46 Mont. 277, 127 Pac 1002. And, at least where no wife or child survives, an allegation of pecuniary loss to such beneficiary is necessary as against demurrer.

[84] Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134 n.; Garrett v. Louisiana &c. Ry. Co., 235 U. S. 308, 35 Sup. Ct. 32; Smith v. Detroit &c. R. Co., 175 Fed. 506; Kelly v. Chesapeake &c. Ry. Co., 201 Fed. 602; Lamners v. Chicago &c. R. Co., 187 Iowa 1277, 175 N. W. 311; Lemon v. Louisville &c. R. Co., 137 Ky. 276, 125 S. W. 701; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Rowlands v. Chicago &c. R. Co., 149 Wis. 51, 135 N. W. 156, Ann. Cas. 1916E, 714 n. See also Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025,

where the plaintiff is uncertain as to whether the facts will make a case under the state law or one under the Federal statute he may so allege them as to cover both, but they should be stated in separate paragraphs or counts.[85] Very important amendments in the pleading have been allowed in some cases, and, in others the refusal to permit amendments in certain instances has been held proper or not to be an abuse of discretion.[86]

106 N. E. 369; Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865, where it is said: "The proper procedure is to plead the facts, and a recovery may then be had accordingly as the evidence may develop a case under the one law or the other" But where the complaint states a cause of action under the state law and not under the Federal Act it is generally held that the defendant can not introduce evidence in interstate commerce, so as to defeat the action on the state law, without pleading such facts in answer. Illinois Cent. R. Co. v. Nelson, 212 Fed. 69; Bradbury v. Chicago &c. R. Co., 149 Iowa 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684 n.; Bitondo v. New York &c. R. Co., 163 App. Div. 823, 149 N. Y. S. 339; Fleming v. Norfolk &c. R. Co., 160 N. Car. 196, 76 S. E. 212; Erie R. Co. v. Welch, 89 Ohio St. 81, 105 N. E. 189. But see Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865; and Gray v. Chicago &c. R. Co., 153 Wis. 636, 142 N. W. 505, Ann. Cas. 1915A, 911 n. As hereafter shown, however, the defendant may have the advantage of the Federal Act so as to defeat recovery, without setting it up by answer, where the complaint is based wholly on the state law and plaintiff's proof, instead of making such a case, shows that it is one under the Federal law. Post § 1979 in 88.

[85] Lucchetti v. Philadelphia &c. Ry. Co., 233 Fed. 137; Bankson v. Illinois Cent. R. Co., 196 Fed. 171; Bouchard v. Central Vt. R. Co., 87 Vt. 399, 89 Atl. 475, L. R. A. 1915C, 33: That is to say, one count should not proceed on both theories, but one count may state facts bringing the case within the Federal statute and the other may allege facts bringing the case within the state law. Among other things, one paragraph might allege that the employe was engaged in interstate commerce and the other not. See also Wabash R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. ed. 1226; Atkinson v. Bullard, 14 Ga. App. 69, 80 S. E. 220.

[86] Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134 n. (amendment as capacity in which plaintiff sued held properly allowed); Vickery v. New London &c. R. Co., 87 Conn. 634, 89 Atl. 277; Curtice v. Chicago &c. R. Co., 162 Wis. 421, 156 N. W. 484, L. R. A. 1916D, 316; Bradbury v. Chicago &c. R. Co., 149 Iowa 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684 (no abuse

§ 1979. Theory of complaint—Act of Congress or state or common law—Election of remedies.—It is a general rule that a complaint, or each paragraph thereof, should proceed on a single and definite theory and in some jurisdictions this rule has been very strictly enforced and applied so as to prevent a recovery on any other theory. But even in such jurisdictions it does not seem to be so strictly enforced or applied in actions under the Federal statute.[87] Where the facts alleged and proved bring the case within the Federal Act it must govern, because, as already shown, that act supersedes the common law and state legislation. It is judicially noticed and constitutes, in such a case, the one law upon the subject. For this reason, probably, the courts are not only inclined to construe a complaint as basing the action on the Federal statute where sufficient facts are stated even though such statute is not mentioned and the complaint might otherwise be considered as proceeding on the theory of a right to recover at common law or under a state statute,[88] but have also held that an injured employe is not

in striking out amendment to answer under circumstances); Illinois Cent. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. 31 (no amendment allowed so as to state a cause of action to conform to proof when there is no evidence to sustain it).

[87] In Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369, the complaint did not appear to proceed under the Federal statute and the case was tried on the theory that it was a common law action, but the complaint stated facts sufficient to constitute a cause of action under such statute and the evidence sustained it. The Supreme Court held that the Federal statute superceded the state law and refused to reverse plaintiff's judgment because of the difference in theory, especially as it appeared that the theory of the recovery was most favorable to the appellant. See also McIntosh v. St. Louis &c. R. Co., 182 Mo. App. 288, 168 S. W. 821; Hogarty v. Philadelphia &c. R. Co., 245 Pa. St. 443, 91 Atl. 854; and compare Fernette v. Pere Marquette R. Co., 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834 with Gaines v. Detroit &c. Ry. Co., 181 Mich. 376, 148 N. W. 397.

[88] See last preceding section; also Stafford v. Norfolk &c. R. Co., 202 Fed. 605; Missouri &c. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134 n.; Grand Trunk &c. R. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 58, 58 L. ed. 838, Ann. Cas. 1914C, 168 n., and note. But compare Bradbury v. Chicago &c. R. Co., 149 Iowa 51, 128 N. W. 1, 40 L. R.

barred on the ground of election of remedy from afterwards proceeding under the Federal law although he has first brought an unsuccessful action at common law.[89] And, on the other hand, it has been held that although the complaint contains the necessary allegations for recovery under the Federal statute, if the evidence shows that the employe was not engaged in interstate commerce and makes a case for recovery at common law, the plaintiff is entitled to have his case submitted under the common law.[90] But to permit a recovery on a theory that is not supported by facts alleged in the complaint seems contrary to principle. When the facts alleged make a case under the Federal Act and are not sufficient to make a case under the state statute, or vice versa, there would seem to be a fatal variance or failure of proof if the only case which the evidence tends to make is the one that is not pleaded, and to permit a recovery on the cause of action not pleaded under such circumstances would often work great injustice to the defendant.[91] And some courts have held that the right to rely on the Federal statute is waived and cannot be successfully claimed for the first time on appeal where no issue of that kind is made by the pleadings

A. (N. S.) 684; Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 190. Defendant may also be entitled to the benefit of its provisions though neither party has pleaded it. St. Louis S. F. & T. R. Co. v. Scale, 229 U. S. 156, 32 Sup. Ct. 656, 57 L. ed. 1129, Ann. Cas. 1914C, 156n. And if the complaint is under the state law, although the defendant should ordinarily answer the facts showing that the case is within the Federal Act in order to defeat recovery on that ground, yet if the plaintiff's evidence shows it and the defendant raises the question by properly asking for direction of a verdict or the like in accordance with the practice, there may be no right to recover in the action even though the defendant did not raise such question by answer. Toledo &c. R. Co. v. Slavin, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. ed. 671. See also St. Louis &c. R. Co. v. Hesterley, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031.

[89] Oliver v. Northern Pac. Ry. Co., 196 Fed. 432. See also Troxell v. Delaware &c. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586.

[90] Jones v. Chesapeake &c. R. Co., 149 Ky. 566, 149 S. W. 951.

[91] See Scale v. St. Louis &c. R. Co., 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C, 156 n; Osborne v. Gray, 241 U. S. 16, 36 Sup. Ct. 486, 60 L. ed. 865; Winfree v. Northern Pac. R. Co., 227 U. S. 296, 33 Sup. Ct. 273, 57 L. ed. 518; Garrett v. Louisville &c.

and the trial court's attention was not called to it in any way.[92] But it is held in a recent case that an action for damages for death of an employe may be predicated on both the Federal Employers' Liability Act and the Safety Appliance Act, and plaintiff may go to the jury, under proper instructions, or as many grounds as the evidence tends to establish, without being required to make an election.[92a]

§ 1980. Damages.—The rules in regard to the measure of damages where the action is brought under the statute by the injured employe, aside from the question of diminishing them in case of contributory negligence in proportion to the negligence attributable to such employe and setting off any sum the carrier has contributed or paid to any insurance, relief benefit, or indemnity—seem to be the same as in other similar cases. Thus, it has been held that he may recover in a proper case for his expenses, loss of time, suffering, and diminished

R. Co., 235 U. S. 308, 35 Sup. Ct. 32, 59 L. ed. 242; Midland Val. R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Cincinnati &c. R. Co. v. Gross, 186 Ind. 471, 114 N. E. 962; Gaines v. Detroit &c. Ry. Co., 181 Mich. 376, 148 N. W. 397; Moliter v. Wabash R. Co., 180 Mo. App. 84, 168 S. W. 250. But it is held that a mere defective statement in the complaint may be aided by verdict where the answer supplies the necessary averments and the case is tried on that theory. St. Louis &c. Ry. Co. v. Sharp, 115 Ark. 308, 171 S. W. 95; Vickery v. New London &c. R. Co., 87 Conn. 634, 89 Atl. 277; White v. Central Vt. Ry. Co., 87 Vt. 330, 89 Atl. 618. In McIntosh v. St. Louis &c. R. Co., 182 Mo. App. 288, 168 S. W. 821, it is held that where the complaint does not show whether it is based on the Federal Act or the state law, a defendant seeking to take advantage of a defense under the former should move to have the complaint made more specific as to the character of the business.

[92] Chicago &c. R. Co. v. Rogers (Tex. Civ. App.), 150 S. W. 281. See also Midland Val. R. Co. v. Lemoyne, 104 Ark. 327, 148 S. W. 654. And see to the effect that a judgment will not be reversed on appeal for allowing a recovery where the complaint counts on the state law and the proof shows a violation of the Federal Act, where the defendant has not been prejudiced thereby, Chicago &c. R. Co. v. Gray, 237 U. S. 399, 35 Sup. Ct. 620, 59 L. ed. 1018; Grand Trunk &c. Ry. Co. v. Thrift, 68 Ind. App. 198, 115 N. E. 685; McIntosh v. St. Louis &c. Ry. Co., 182 Mo. App. 288, 168 S. W. 821.

[92a] Flanigan v. Hines (Kans.), 193 Pac. 1077.

power to earn money;[93] but not for mental worry over the loss of income and future welfare of his wife and child.[94] In case of contributory negligence, where the defendant's negligence is not in the violation of Federal statutes, the measure of recovery is the proportional amount bearing the same relation to the full amount that the negligence attributable to the carrier bears to the entire negligence attributable to both plaintiff and defendant.[95] Negligence on the part of the employe which does not proximately contribute to the injury, or, in other words, is not causal, does not operate to reduce the damages within this rule.[96] Under the Act as originally passed the pecuniary loss to the beneficiary or beneficiaries is the measure of damages.[97] Such loss is not necessarily dependent upon any legal liability of the injured person to the beneficiary, but there must be some reasonable expectation of support or assistance of which the beneficiary is deprived.[98] The widow can not recover for

[93] Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 177.

[94] Ferebee v. Norfolk &c. R. Co., 163 N. Car. 351, 79 S. E. 685, 52 L. R. A. (N. S.) 1114n.

[95] Norfolk &c. R. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172 and note. See also Illinois Cent. R. Co. v. Shaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. ed. 528; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Hall v. Vandalia R. Co., 169 Ill. App. 12; Cincinnati &c. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329; Fogarty v. Northern Pac. R. Co., 74 Wash. 397, 133 Pac. 609. For instruction held bad, see Nashville &c. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554.

[96] Illinois Cent. R. Co. v. Porter, 207 Fed. 311; Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. ed. 528; Pyles v. Atchison &c. R. Co., 97 Kans. 455, 155 Pac. 788; Davis' Admx. v. Cincinnati &c. R. Co., 172 Ky. 55, 188 S. W. 1061, Ann. Cas. 1918E, 414 n; Fletcher v. South Dakota &c. R. Co., 36 S. Dak. 401, 155 N. W. 3.

[97] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 177, and note; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Fogarty v. Northern Pac. R. Co., 74 Wash. 397, 133 Pac. 609 (also holding that where the action is for the benefit of the widow and minor child the injury must apportion the damages).

[98] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176; McCullough v. Chicago &c. R. Co., 160 Iowa 524, 142 N. W. 67, 47 L. R. A. (N. S.) 23 (also considering what is and is not proper or sufficient evidence to show pecuniary loss).

"care and advice" of her husband, of which she may have been deprived, in addition to the loss of maintenance and support;[99] but the loss by a minor of a parent's attention, care and training is regarded as of pecuniary value and may properly be considered by the jury in determining the damages.[1] Under the Act as originally passed nothing could be recovered in an action for death of the employe for pain suffered by him before his death;[2] but under the amendment of 1910 it is held that in one action damages may be recovered both for the pecuniary loss to the beneficiaries and for the pain and suffering of the injured employe.[3]

§ 1981. Distribution and apportionment of damages.—The measure of damages, as already indicated, is determined by the Federal Act and decisions, and a state statute limiting recovery to a certain sum in case of death does not apply to an action

[99] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176. Nor is loss of companionship of a son pecuniary loss recoverable under the Act. American R. Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. ed. 456.

[1] Cain v. Southern R. Co. 199 Fed. 211; St. Louis &c. R. Co. v. Duke, 192 Fed. 306, 112 C. C. A. 564; St. Louis &c. R. Co. v. Geer (Tex. Civ. App.), 149 S. W. 1178.

[2] St. Louis &c. R. Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031. But compare Dooley v. Seaboard Air Line R. Co., 163 N. Car. 454, 79 S. E. 970, Ann. Cas. 1915B, 598 n; which, however, is based upon decisions in cases arising before the amendment of 1910.

[3] St. Louis &c. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93; St. Louis &c. R. Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160. In this case the subject is thus elucidated: "No changes were made in § 1. It continues, as before, to provide for two distinct rights of action—one in the injured person, for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides, in exact words, that the right given to the injured person 'shall survive' to his personal representative 'for the benefit' of the same relatives in whose behalf the other right is given. * * * It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss

under such act.[4] So, even the distribution of money recovered or received by the administrator under the act is governed by it, and not by any state statute of descent or distribution, and must go to the beneficiaries designated in the Act.[5] Where there are several beneficiaries of the class entitled to damages in the action, the apportionment of damages among them should be made by the jury, and the amount due each should be separately stated in the verdict.[6]

and suffering while he lived, but taking no account of his premature death, or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative, to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and § 1 are read together, the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensating for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died; while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong." See also Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 37 Sup. Ct. 41, 61 L. ed. 208, L. R. A. 1917E, 1050.

[4] Devine v. Chicago &c. R. Co., 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916B, 481 n; affd. in 239 U. S. 52, 36 Sup. Ct. 272, 60 L. ed. 140; Nashville &c. Ry. Co. v. Henry, 158 Ky. 88, 164 S. W. 310; Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328.

[5] Taylor v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. ed. 638. But a state statute giving a father earnings of his son during minority is applicable in a proper case to justify a recovery of some damages without any other evidence of pecuniary loss. Minneapolis &c. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. ed. 995.

[6] Gulf C. & S. F. Ry. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785; Southern Ry. Co. v. Smith, 205 Fed. 360; Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328; Collins v. Pennsylvania R. Co., 163 App. Div. 452, 148 N. Y. S. 777. But failure of the jury to do so, where there was no request for it, has been held not to cause a reversal. Kansas City &c. R. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. ed. 1478; Central Vermont R. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. ed. 1433, Ann. Cas. 1916B, 252.

CHAPTER LIX

SAFETY APPLIANCE ACTS

Sec.
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§ 1985. **State Safety Appliance Acts generally.**—Many of the states have safety appliance acts for the protection of employes in railroad service and some of them are also for the protection of travelers. Few, if any, of them do more than require some particular appliance or kind of appliance on engines or cars, or both, and they do not attempt to make provision for every appliance that may be used in the management of a railroad and conduct of its business. Some of them are expressly limited to intrastate railroads or business; others appear to supplement, or to undertake to supplement, the Federal Safety Appliance Acts to which we have elsewhere called attention

and which will hereinafter be considered; and others, most of which were passed before the Federal Act, do not make any distinction between intrastate and interstate commerce. It follows that while some of them may be valid and in force, some are invalid or superseded by the Federal law. The question as to whether a particular state act is valid and enforceable, especially since Congress has acted, to some extent at least, upon the subject, is not always easy to determine. In this chapter we shall first consider this question and the construction and application of state statutes that have been held valid and still in force, and shall then consider in detail the Federal Safety Appliance Acts.

§ 1986. State acts as superseded or affected by Federal Safety Appliance Acts.—In a recent case the Supreme Court of the United States held that cars used in moving intrastate traffic, even though not in connection with interstate cars, on a railroad constituting a highway of interstate commerce are within the provision of the Federal Safety Appliance Act.[1] This leaves very little upon which a state safety appliance act can operate unless it should be given effect as merely supplementary or in aid of the Federal Act, or, unless as to the penal provision, the same thing can be an offense against both jurisdictions. On the one hand, it may be argued that as Congress has acted on the subject it is withdrawn from state action and state laws are superseded, so far at least as the subject is covered by valid Congressional action. On the other hand, it may be argued that the state may legislate with respect to instrumentalities of commerce as distinguished from commerce itself and that even an interstate carrier may violate the state law, or both laws, in failing to comply with them in respect to an intrastate car. So, it has been argued and held in some cases that a state law may be valid where the specific phase of the subject is not covered by Act of Congress and the state law is merely

[1] Southern R. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72. See also Southern R. Co. v. Railroad Com. of Ind., 236 U. S. 439, 35 Sup. Ct. 304, 59 L. ed. 661; Texas &c. R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874.

in aid thereof or supplementary thereto. The Supreme Court of Ohio has held a state act valid on both of these grounds;[2] but the action was one for the statutory penalty and it does not necessarily follow that the court would hold the statute applicable in a personal injury action where the car is used by an interstate carrier even though at the time in interstate traffic. It was also held under the original acts that a state statute regulating headlights on locomotives is valid as Congress has not directly legislated upon the precise subject.[3] There are Indiana decisions to much the same effect as the Ohio decision,[4] although in one of them, which seems to go about as far as any of them, the Ohio case is criticised.[5] These cases also hold that several of the acts in question can and should be construed as applying only to intrastate commerce, and that in any event they are valid and capable of enforcement to that extent.[6] It has also been held in Illinois that recovery for injury to a switchman on an interstate road might be had under a state statute in substantial conformity with the Federal Act requiring automatic couplers where the car was being used in

[2] Detroit &c. R. Co. v. State, 82 Ohio St. 60, 91 N. E. 869, 137 Am. St. 758.

[3] Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. 829; Vandalia R. Co. v. Railroad Com., 182 Ind. 383, 101 N. E. 85; Atlantic Coast Line R. Co. v. State, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. ed. 1312. But see under amendments to boiler inspection act, Louisville &c. R. Co. v. State (Ala.), 76 So. 505.

[4] State v. Louisville &c. R. Co., 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284; Pittsburgh &c. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915D, 458n; Southern R. Co. v. Railroad Com., 179 Ind. 23, 100 N. E. 337 (lately reversed in 236 U. S. 439, 35 Sup. Ct. 304, 59 L. ed. 661). See also Vandalia R. Co. v. R. R. Com. of Ind., 182 Ind. 382, 101 N. E. 85; Cleveland &c. R. Co. v. Railroad Com. (Ind.), 102 N. E. 829; Freeman v. Swan (Tex. Civ. App.), 143 S. W. 724. But compare Southern R. Co. v. Railroad Com., 183 Ind. 580, 109 N. E. 759; reversing judgment in same case above referred to, in accordance with recent decision in 236 U. S. 439, 35 Sup. Ct. 304, 59 L. ed. 661. And see Vandalia R. Co. v. Pub. Serv. Com. of Ind., 242 U. S. 255, 61 L. ed. 276, 37 Sup. Ct. 93.

[5] Southern R. Co. v. Railroad Com., 179 Ind. 23, 39, 100 N. E. 337.

[6] See especially Pittsburgh &c. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915D, 458n; State v. Louisville &c. R. Co., 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284n.

intrastate commerce.[7] But this decision seems to be contrary to that of the Supreme Court of the United States in the first case referred to in this section and to other recent cases in the Federal courts referred to in considering the Federal Employers' Liability Act; and under such Federal decisions it is questionable whether the state acts were properly upheld in some of the other state decisions above considered, so as to govern an action for personal injuries, notwithstanding there may be no direct conflict between their provisions and those of a Federal Act upon the subject. Where the case is clearly one of intrastate employment and commerce, so that the Federal Act does not apply, the state statute may doubtless govern it; but if there is conflict between the state statute and a valid Federal Act the latter must govern a case within its provisions, and it seems to us that even though there is no direct conflict the Federal Act must govern in the case of an action for personal injuries involving interstate commerce and within the provisions of such Act as construed and applied by the Supreme Court of the United States.[8] So it is held, in a case reported since the foregoing was written, that in view of the Federal Safety Appliance Act and the regulations of the Interstate Commerce Commission, a state statute requiring every train to have at its rear a platform thirty inches wide with guard rails and steps, cannot be applied to interstate commerce trains as the field has already been occupied by Federal law and regulations.[8a]

[7] Luken v. Lake Shore &c. R. Co., 248 Ill. 377, 94 N. E. 175, 140 Am. St. 220, 21 Ann. Cas. 82.

[8] See Louisville &c. R. Co. v. Hughes, 201 Fed. 727; Erie R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138n. The case of Southern R. Co. v. Railroad Com., 236 U. S. 439, 35 Sup. Ct. 304, 59 L. ed. 661, decided since this section was written, seems to settle the question in accordance with our view as stated in the text. The test seems to be whether Congress has lawfully occupied the field so that the state has no jurisdiction; not merely whether the state legislation is in conflict with details of the Federal law or supplements it. See also Erie R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138 and notes; State v. Beaumont &c. R. (Tex. Civ. App.), 183 S. W. 120.

[8a] Pennsylvania R. Co. v. Public Service Com., 250 U. S. 566, 63 L. ed. 1143, 40 Sup. Ct. 36.

§ 1987. State acts as to automatic bell ringers and headlights.—State statutes requiring automatic bell ringers have been upheld;[9] and so have such statutes requiring headlights on locomotives.[10] But these cases did not involve any question as to the liability of the company to an employe, and Congress had not then acted on the subject of locomotive headlights.[11]

§ 1988. State acts as to kinds of cars and their equipment or use.—The question as to the validity and effect of state statutes regulating the kind of cars or their equipment has also arisen in recent cases, and in some of them the question as to the liability of the company to an employe was also involved. In one case the statute gave the Railroad Commission certain powers in the matter of regulating the size and equipment of caboose cars and it was held valid against various constitutional objections, including the objection that it was a regulation of commerce. The court held that it was directed merely at the form of an instrumentality as to a matter concerning which Congress had not seen fit to act, and that, even if valid in part, the section under which the carrier was prosecuted was independent and it could not complain of the invalidity of another section.[12] The same court has upheld statutes as to grab irons or hand holds and automatic couplers.[13] But this case has been reversed in a very recent decision by the Supreme Court of the United States.[14] In a Texas case it was held that a state statute requiring automatic couplers was valid until

[9] State v. Louisville &c. R. Co., 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284n.

[10] Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, affirmed in 234 U. S. 280, 34 Sup. Ct. 829, 58 L. ed. 1312; Vandalia R. Co. v. Railroad Com., 182 Ind. 383, 101 N. E. 85.

[11] See Louisville &c. R. Co. v. State (Ala.), 76 So. 505 and Vandalia R. Co. v. Pub. Serv. Com. of Ind., 242 U. S. 255, 61 L. ed. 276, 37 Sup Ct. 141.

[12] Pittsburgh &c. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915D, 458n.

[13] Southern R. Co. v. Railroad Com., 179 Ind. 23, 100 N. E. 337; Cleveland &c. R. Co. v. Railroad Com. (Ind.), 102 N. E. 829. See also Detroit &c. R. Co. v. State, 82 Ohio St. 60, 91 N. E. 869, 137 Am. St. 758.

[14] Southern Ry. Co. v. Railroad Co., 236 U. S. 439, 35 Sup. Ct. 304,

Congress had acted upon the subject and that the result of such action would be merely to limit the application of the state statute so as not to include cars in interstate service.[15] It has also been held by the Supreme Court of the United States that prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, as done by an Arkansas statute, is not an unlawful interference with interstate commerce, as Congress has not acted upon the subject.[16] Such statutes requiring automatic couplers and other specified equipment are usually held to impose an absolute duty which can not be discharged by the mere exercise of reasonable care so as to free the company from liability for injury to an employe caused by its failure to comply with the statute.[17] Most of them abolish or exclude the defense of assumption of risks.[18] The courts have been liberal in construing the term "car," and the like as used in such statutes,[19] but a whirley, derrick, or locomotive crane built upon car trucks, and equipped with a boiler and engine furnishing the power to operate it and to move it upon the track in the vicinity where it is operated by the company, in unloading heavy material for the construction of docks and not employed in the company's business as a common carrier has been held not to be a "locomotive, car, tender, or similar vehicle used in moving state traffic," under the Ohio statute.[20]

59 L. ed. 661, followed in same case in 183 Ind. 580, 109 N. E. 759.

[15] Freeman v. Swan (Tex. Civ. App.), 143 S. W. 724.

[16] Chicago &c. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. ed. 290, affirming 86 Ark. 412, 111 S. W. 456.

[17] Luken v. Lake Shore &c. R. Co., 248 Ill. 377, 94 N. E. 175, 140 Am. St. 220, 21 Ann. Cas. 82; Erlinger v. St. Louis &c. R. Co., 152 Ill. App. 640. See also McGarvey v. Detroit &c. R. Co., 83 Ohio St. 273, 94 N. E. 424; Delk v. St. Louis &c. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. ed. 590.

[18] Betterly v. Boyne City &c. R. Co., 158 Mich. 385, 122 N. W. 635 (holding it impliedly excluded but employe might be guilty of contributory negligence); McGarvey v. Detroit &c. R. Co., 83 Ohio St. 273, 94 N. E. 424. The Illinois statute expressly excludes such defense.

[19] See Schlemmer v. Buffalo &c. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 681; Philadelphia &c. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112.

[20] Lake Shore &c. R. Co. v. Benson, 85 Ohio St. 215, 97 N. E. 417, 41 L. R. A. (N. S.) 49, Ann. Cas.

§ 1989. Act of Congress of March 2, 1893, and amendments—Automatic couplers—Brakes—Grab irons—Drawbars.—In 1893, Congress passed an "Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes." Section 1 of the Act provides that "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer . . . can control its speed without requiring brakemen to use the common hand brake for that purpose." Section 3 provides "that when any . . . (carrier) engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars (with brakes) . . . it may lawfully refuse to receive from connecting lines . . . any cars not (so) equipped." Section 2 provides that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Section 4 provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars, until otherwise ordered by the Interstate Commerce Commission." Section 5 gives the Interstate Commerce Commission the power to fix the height of drawbars on designation of the American Railway Association. A penalty is imposed by section 6, as amended April 1, 1896, "for

1913A, 945n. See also Bryce v. Burlington &c. R. Co., 119 Iowa 274, 93 N. W. 275, 97 Am. St. 315; Blanchard v. Detroit &c. R. Co., 139 Mich. 694, 103 N. W. 170; United States v. Montpelier &c. R. Co., 175 Fed. 874.

using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of the provisions." By an amendment of March 2, 1903, the provisions of the act were extended so as to apply "to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and . . . (the other provisions of said act) shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, . . . (or) used in connection therewith." And it is further required that 50 per cent. of the cars in such trains shall have their brakes so connected as to be operated by the engineer; the Interstate Commerce Commission being empowered to increase such minimum percentage. Another amendment was made in 1910 for the standardization of appliances; and orders of the Interstate Commerce Commission were made under these amendments of 1903 and 1910. The second section of the original act should be read and construed as if a comma were inserted after the word "uncoupled" therein.[21] It is expressly provided in the last section of the Act (section 8) that any employe of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of the act shall not be deemed thereby to have assumed the risk thereby occasioned; although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge, and the word "car" as used in the Act and amendment is given a very comprehensive meaning. It includes a locomotive and a steam shovel car, and, in general, any kind of a car running on rails.[22]

§ 1990. Supplementary Act of 1910—Ladders, brakes, etc.—Repairs—Penalty and liability for death or injury of employe.—

[21] Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363; Roberts' Federal Liability of Carriers, Appendix H, 1598. et seq.; post § 1990, next following.

[22] Schlemmer v. Buffalo &c. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 681; Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363; United States v.

A supplementary act was passed April 14, 1910, applicable to every common carrier and every vehicle subject to the original safety appliance act and its amendments. This act provides "that on and after July first, nineteen hundred and eleven, it shall be unlawful for any carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose." The third section of the act gives the Interstate Commerce Commission power, after hearing, to fix and change the number, dimensions, location and manner of application of the appliances provided for by the above section and by section 4 of the act of March 2, 1893, and to extend the time for compliance. Section 4 provides "that any carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be subject to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment

Southern R. Co., 170 Fed. 1014; Philadelphia &c. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112, affirming 4 Penn. (Del.) 80, 53 Atl. 90 (tender of switch engine). But see as to electric car, Campbell v. Spokane &c. R. Co., 188 Fed. 516.

was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight." Section 5 provides "that except that, within the limits specified in the preceding section," the movement of a car with defective or insecure equipment may be made without incurring the penalty prescribed, but shall in all other respects be unlawful, nothing in the Act shall be construed as relieving the carrier, the Interstate Commerce Commission or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of the original act and amendments. And section 6 makes it the duty of the Interstate Commerce Commission to enforce the provisions of the Act.[23]

[23] See Transportation Act 1920, § 441, Barnes' Fed. Code, Supplement 1921, § 7920c. See also as to footboard or running board on end of engine tender. Bramlett v. Southern Ry. Co., 98 S. Car. 319, 82 S. E. 501. This act is held not to permit movement of cars with defective equipment on side tracks or in yards except to the nearest available point for repairs and is violated by moving cars from one yard to another and failing to make repairs for nearly two weeks. United States v. Chesapeake &c. Ry. Co., 213 Fed. 748.

§ 1991. Orders of Interstate Commerce Commission.—On June 6, 1910, the Interstate Commerce Commission in pursuance of the provision in section 2 of the amendatory act of March 2, 1903, made and entered an order fixing the per centum of cars in a train to have brakes and operated by the engineer of the locomotive at not less than eighty-five per cent. On October 10, 1910, under the authority given under the supplementary act the Commission fixed the standard and minimum height of drawbars; and on March 13, 1911, the Commission fixed the number, dimensions, location and manner of application of the hand brakes, steps, hand holds, ladders, uncoupling levers and the like; but as to some cars and some of these appliances carriers were granted an extension of time of from one to five years from July 1, 1911, in which to complete the changes.[23a]

§ 1992. What carriers and cars are included in Safety Appliance Act.—The duty to equip cars as required by the safety appliance act, since the amendment of 1903, exists in the case of an interstate railroad no matter whether its cars are engaged in intrastate or interstate commerce, so long as they are used on interstate highways.[24] The Safety Appliance Act has been held to include, as a railroad, a private switch used by a railroad company in transporting cars in interstate commerce to and from a mill with the railroad company's engines.[25] So, it has been held to apply to a narrow gauge road carrying articles of interstate commerce, although located entirely within the limits of a single state;[26] and to a terminal or belt road company

See also Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874.

[23a] This order was construed on November 6, 1911, in Conference Rulings number 328 and 329.

[24] Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72; Southern Ry. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. ed. 1564; United States v. Pacific Coast Ry. Co., 173 Fed. 453, 458; Stearns v. Chicago &c. R. Co., 166 Iowa 566, 148 N. W. 128; Texas &c. R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874.

[25] Gray v. Louisville &c. R. Co., 197 Fed. 874. See also United States v. Geddes, 131 Fed. 452.

[26] United States v. Colorado &c. R. Co., 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; Pacific Coast R. Co. v. United States, 173 Fed. 448.

engaged in shifting cars en route from one state to another between two trunk lines.[27] And it includes ordinary switching and switch engines on interstate highways.[28]

§ 1993. **Empty cars and cars in yards for repairs.**—It has been held that there can be no recovery for the penalty prescribed by the safety appliance act where empty cars are being moved alone or in trains by themselves to the shop for repairs;[29] and in one case it was held that when a car is condemned and placed upon a siding for repairs it ceases to be engaged in interstate commerce and the Safety Appliance Act is not applicable so as to give a right of action for killing a brakeman who went between it and another car to uncouple them while being taken to the shop for repairs.[30] But, on the other hand, movement of such cars to be repaired, in connection with others engaged in interstate commerce, is a violation of the provisions of the

[27] Belt R. Co. v. United States, 168 Fed. 542, 22 L. R. A. (N. S.) 582. See also Union Stockyards Co. v. United States, 169 Fed. 404; United States v. Northern Pac. Terminal Co., 144 Fed. 861. And to an electric interurban railroad engaged in interstate commerce. Spokane &c. R. Co. v. United States, 241 U. S. 344, 36 Sup. Ct. 668, 60 L. ed. 1037, Ann. Cas. 1917C. 522; Spokane &c. R. Co. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. ed. 1125.

[28] Southern R. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72; United States v. Atlantic &c. R. Co., 214 Fed. 498. But compare United States v. Erie R. Co., 212 Fed. 853 (air brakes not required in switching operations); Stearns v. Chicago &c. Ry. Co., 166 Iowa 566, 148 N. W. 128. The provision of Section 1 of the Act in regard to train brakes under engine control is not limited to operatives on main line tracks, and a terminal railroad several miles long, crossing other railroads and streets and on which trains are run at considerable speed is within the Act. United States v. Northern Pac. Ry. Co. (U. S.), 41 Sup. Ct. 101. See also and compare Louisville &c. Bridge Co. v. United States, 249 U. S. 534, 39 Sup. Ct. 355, 63 L. ed. 757.

[29] Chicago &c. R. Co. v. United States, 168 Fed. 236, 21 L. R. A. (N. S.) 690; United States v. Rio Grande &c. R. Co., 174 Fed. 399. The question of reasonable necessity for moving the defective car for repairs is usually for the jury. Galveston &c. R. Co. v. United States, 199 Fed. 891. See also further as to hauling cars for repairs, United States v. Chesapeake &c. R. Co., 242 Fed. 161; Erie R. Co. v. United States, 240 Fed. 28.

[30] Siegel v. New York &c. R. R., 178 Fed. 873.

act;[31] and it has been held that an empty car billed to the repair shop but left upon a switch for temporary repairs by an interstate train and subsequently hauled out by an interstate train was within the act so as to entitle a brakeman to recover for injury received while attempting to adjust the knuckle of the car on the switch.[32] So, under the rule laid down in a recent decision of the Supreme Court of the United States already referred to,[33] some of the decisions cited in the earlier part of this section are questionable, and under the provision in the supplementary act of April 14, 1910, it seems that although a car which has become defective or insecure while in use on the road may be hauled to the nearest available point for repair without liability to the penalty prescribed, this is at the sole risk of the carrier and does not relieve the carrier from liability for the death or injury of an employe by reason of or in connection with the movement or hauling of such car with equipment not maintained in accordance with the act.

§ 1994. Specific duties and requirements—Coupling apparatus—Proof of violation.—The coupling and uncoupling apparatus on each end of every car should be in an operative condition,[34] and it has been held that the existence of a defective drawbar on the front of a locomotive subjects the carrier to the penalty prescribed, and such penalty can not be avoided by showing

[31] Southern R. Co. v. Snyder, 187 Fed. 492. See also Great Northern R. Co. v. Otos, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. ed. 322, Ann. Cas. 1918E, 34.

[32] Erie R. Co. v. Russell, 183 Fed. 722. See also Delk v. St. Louis &c. R. Co., 220 U. S. 580, 51 Sup. Ct. 617, 55 L. ed. 590; Gray v. Louisville &c. R. Co., 197 Fed. 874; Chicago &c. R. Co. v. United States, 211 Fed. 12; United States v. Chesapeake &c. R. Co., 213 Fed. 748.

[33] Southern R. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72. See also Delk v. St. Louis &c. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. ed. 590; Great Northern R. Co. v. Otos, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. ed. 322, Ann. Cas. 1918E, 34.

[34] United States v. Baltimore &c. R. Co., 170 Fed. 456; United States v. Southern R. Co., 170 Fed. 1014. See also Chicago &c. Ry. Co. v. Voelker, 129 Fed. 522, 70 L. R. A. 265; United States v. Southern Pac. Co., 167 Fed. 699; United States v. Central of Ga. R. Co., 157 Fed. 893.

that the coupler at that end was not used and the engine was reversed so as to use the coupler at the other end.[35] There is a violation of the automatic coupler clause where a car, although equipped with automatic couplers, is hauled in interstate commerce so loaded with lumber that it projects over the uncoupling lever to such an extent as to prevent its operation;[36] and it has been said that the act applies to all cars engaged in interstate commerce that will not couple automatically, or cannot be uncoupled without going between them, no matter whether the fault is due to the character of the car, to the kind of equipment, or to the fact that at the time the coupling is sought to be made the cars are on a curve so that the couplers will not meet unless someone goes between the cars to adjust the couplers.[37] The necessity of going between the cars to uncouple them does not mean an absolute necessity or physical impossibility of uncoupling them in any other way, and the possibility of uncoupling by crawling under a car or climbing over it does not negative such necessity as the statute means.[38] The law applies to empty cars in an interstate train and traffic as

[35] Chicago &c. R. Co. v. United States, 196 Fed. 882. See also United States v. Philadelphia &c. Ry. Co., 223 Fed. 215. But compare Wabash R. Co. v. United States, 172 Fed. 864. Neither the original act nor the amendment of 1903 requires automatic couplers between engine and tender, as they are regarded as a single thing not ordinarily separated. Pennell v. Philadelphia &c. R. Co., 231 U. S. 675, 34 Sup. Ct. 220, 58 L. ed. 430. And it has been held that coupling of air and steam hose is not within the act. Yost v. Union Pac. R. Co., 245 Mo. 219, 149 S. W. 577. But compare United States v. Boston &c. R. Co., 168 Fed. 148.

[36] United States v. Illinois Cent. R. Co., 177 Fed. 801.

[37] Hohenleitner v. Southern Pac. Co., 177 Fed. 796. See also Minneapolis &c. R. Co. v. Golsetrall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. ed. 995; Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 Sup. Ct. 69, 61 L. ed. 150; Davis v. Minneapolis &c. R. Co., 134 Minn. 369, 159 N. W. 802. But it has been held that the Federal Employers' Liability Act "is not aimed at the dangers incident to preventing recoupling of cars about to be kicked." Weiss v. Belt Ry. Co., 186 Ill. App. 43.

[38] Norfolk &c. R. Co. v. United States, 177 Fed. 623. See also Chicago &c. R. Co. v. United States, 211 Fed. 12; Chicago &c. Ry. Co. v. Brown, 185 Fed. 80; United States v. El Paso &c. Co. (U. S. Dist. Ct. Arizona), reported in Thornton's Fed. Liabil. & Safety

well as to loaded ones;[39] and may require the company to inspect foreign cars as well as its own.[40] A railroad company hauling a car in the course of interstate commerce, with an automatic coupler out of repair, has been held not to satisfy the safety appliance act by placing a "bad order card" on the car.[41] And proof that a car had a defective coupler has been held sufficient to make at least a prima facie case against the company in that respect.[42]

§ 1995. Specific duties and requirements—Miscellaneous.—Section 4 of the act requiring grab irons has been held applicable to passenger cars;[43] and compliance with the provisions as to grab irons or hand holds is not rendered unnecessary by the

Appliance Acts 525. But it must be shown that the car would not couple automatically by impact or that there was such necessity to go between to uncouple as the statute means. United States v. Montpelier &c. R. R., 175 Fed. 874. And this requirement as to automatic couplers has been held not to form the basis for an action for injuries received in a collision. Campbell v. Spokane &c. R. Co., 188 Fed. 516.

[39] Luken v. Lake Shore &c. R. Co., 248 Ill. 377, 94 N. E. 175, 140 Am. St. 220, 21 Ann. Cas. 82. See also St. Joseph &c. R. Co. v. Moore, 243 U. S. 311, 37 Sup. Ct. 278, 61 L. ed. 741; Johnson v. Great Northern R. Co., 178 Fed. 643; Voelker v. Chicago &c. Ry. Co., 116 Fed. 867; Wabash R. Co. v. United States, 168 Fed. 1.

[40] Grand Trunk &c. R. Co. v. Poole, 175 Ind. 567, 93 N. E. 26. See also Philadelphia &c. R. Co. v. United States, 191 Fed. 1; Norfolk &c. R. Co. v. United States, 191 Fed. 302.

[41] United States v. Chicago &c. R. Co., 173 Fed. 684. See also United States v. Southern Ry. Co., 135 Fed. 122.

[42] Grand Trunk Western R. Co. v. Poole, 175 Ind. 567, 93 N. E. 26. See also Chicago &c. R. Co. v. United States, 196 Fed. 882 (defective draw bar). But compare Hunsaker's Admx. v. Chesapeake &c. Ry. Co., 185 Ky. 686, 215 S. W. 552.

[43] Norfolk &c. R. Co. v. United States, 177 Fed. 623; United States v. Baltimore &c. R. Co., 184 Fed. 99; Spokane &c. R. Co. v. United States, 241 U. S. 344, 36 Sup. Ct. 668, 60 L. ed. 1037, Ann. Cas. 1917C, 522. So, by the amendment of 1903 the handhold or grabiron provision was extended to locomotives and cars and similar vehicles used in connection with cars used in interstate commerce. United States v. Illinois Cent. R. Co., 166 Fed. 997. And it has been held that foreign as well as domestic cars are included. Missouri &c. R. Co. v. Barrington (Tex. Civ. App.), 173 S. W. 595; Missouri &c. R. Co. v. Plerumons (Tex. Civ. App.), 171 S. W. 259.

presence of air hose, signal hose, steam hose, uncoupling chains, hand brake shafts or operating rods of the steam hose.[44] A locomotive and caboose attached to a freight train have been held to come within the meaning of the words "freight cars" in the provision requiring a standard height of drawbars.[45] The use of hand brakes on certain grades under standing orders of the company, has been held not to constitute a violation of the act where it does not appear that there were not a sufficient number of power brake cars in the train.[46] But it has been held a violation of the act to haul a car of interstate freight with a locomotive having a defective air brake pump and not equipped with means of applying power brakes to the train or having its driving wheels equipped with power brakes.[47] The provisions of the act as to automatic couplers and grab-irons seem to be broad enough to include cars used in switching operations, but switching movements in railroad yards are not train movements within the meaning of the air brake provision.[48]

[44] United States v. Norfolk &c. R. Co., 184 Fed. 99. See also St. Joseph &c. R. Co. v. Moore, 243 U. S. 311, 37 Sup. Ct. 278, 61 L. ed. 741. See generally as to grab irons or handholds. United States v. Chicago &c. R. Co., 157 Fed. 616; United States v. Illinois Cent. R. Co., 166 Fed. 997; Wabash R. Co. v. United States, 168 Fed. 1; Dawson v. Chicago &c. Ry. Co., 114 Fed. 870; United States v. Boston &c. R. Co., 168 Fed. 148; Malott v. Hood, 201 Ill. 202, 66 N. E. 247; Coley v. North Carolina R. Co., 128 N. Car. 534, 39 S. E. 43, 57 L. R. A. 817n. The Act does not specifically require that grabirons or handholds be placed on all four corners, and it may be complied with by secure and adequate handholds on the diagonally opposite corners of the car. Boehmer v. Penna. R. Co., 252 U. S. 496, 40 Sup. Ct. 409.

[45] Chicago &c. R. Co. v. United States, 196 Fed. 882. And section 5 of the original act as to the standard height of drawbars even if applicable only to freight cars was made applicable also to engines or locomotives by the amendatory acts. Southern R. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. ed. 1564.

[46] United States v. Baltimore &c. R. Co., 176 Fed. 114.

[47] United States v. Louisville &c. R. Co., 162 Fed. 185, affd. in 174 Fed. 1021. See also United States v. Atlantic &c. R. Co., 214 Fed. 498. See as to construction of Section 5 of original act in regard to height of drawbars on freight cars. St. Louis &c. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 53 L. ed. 1061.

[48] United States v. Erie R. Co., 237 U. S. 402, 35 Sup. Ct. 621, 59

§ 1996. **Unit of offense—Penalty.**—The car, rather than the train is the unit of offense. And if several cars, each without the appliances or equipment required by the act, are hauled by the carrier in a train at the same time, there is a several and distinct violation as to each car and a penalty is recoverable for each.[49]

§ 1997. **Duty to comply with safety appliance act is absolute—Liability without negligence.**—The duty to comply with the Safety Appliance Act is absolute and liability in case of failure to do so does not depend upon proof of negligence other than the fact of the violation of the statute. In other words, as said by the Supreme Court of the United States: "If the railroad company uses cars which do not comply with the standard, it violates plain prohibitions of the law and there arises from that violation the liability to make compensation to one who is injured by it."[50]

§ 1998. **Assumption of risks.**—The act under consideration

L. ed. 1019; United States v. Chicago &c. R. Co., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. ed. 1023. But movements on the road or by a switching crew from one yard to another seem to be within the provision. La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667. See also Pennsylvania R. Co. v. United States, 241 Fed. 824; Stearns v. Chicago &c. R. Co., 166 Iowa 566, 148 N. W. 128. But compare United States v. New York Cent. &c. R. Co., 205 Fed. 428; Rosney v. Erie R. Co., 135 Fed. 311. Interurban electric railroads are included under the amendment of 1903 and require air brakes. Spokane &c. R. Co. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. ed. 1125.

[49] United States v. St. Louis &c. R. Co., 184 Fed. 28; St. Louis &c. R. Co. v. United States, 183 Fed. 770.

[50] St. Louis &c. Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061; Delk v. St. Louis &c. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. ed. 590. See also to same effect St. Joseph &c. R. Co. v. Moore, 243 U. S. 311, 37 Sup. Ct. 278, 61 L. ed. 741; Brinkmeier v. Missouri Pac. R. Co., 81 Kans. 101, 105 Pac. 221, affd. in 224 U. S. 268, 32 Sup. Ct. 412, 56 L. ed. 758; Burho v. Minneapolis &c. R. Co., 121 Minn. 326, 141 N. W. 300; Thayer v. Denver &c. R. Co., 25 N. Mex. 559, 185 Pac. 542; Lang v. New York Cent. R. Co., 227 N. Y. 507, 125 N. E. 681; Chesapeake &c. R. Co. v. Arrington, 126 Va. 194, 101 S. E. 415; Atlantic &c. R. Co. v. United States, 168 Fed. 175; Chicago &c.

expressly provides that an employe injured by any locomotive or car or train in use contrary to the provisions of the act shall not be deemed to have assumed the risk thereby occasioned; and the Federal Employers' Liability Act also provides that assumption of risk shall not be a defense in such case. The language is plain and it has been so interpreted by the courts.[51] It has also been held that the possibility of a railroad employe's miscalculating the height to which he might safely raise his head, while attempting to make a coupling with a car not equipped with an automatic coupler, is so clearly and inevitably attached to the risk which he does not assume under the Safety Appliance Act, as to prevent the court from holding as a matter of law that he was guilty of contributory negligence defeating a recovery merely because he raised his head a little too high although warned of the danger.[52]

§ 1999. Contributory negligence.—The Safety Appliance Act

Ry. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. ed. 1204. See also for evidence held sufficient to show such violation and that it was a proximate cause of the injury. Montgomery v. Carolina &c. R. Co., 163 N. Car. 597, 80 S. E. 83. A defective coupler when the proximate cause of the injury authorizes a recovery although the employe was not engaged in coupling at the time. Louisville &c. R. Co. v. Taylor, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. ed. 931, followed in Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752. See also Minneapolis &c. R. Co. v. Gotschall, 244 U. S. 66, 38 Sup. Ct. 598, 61 L. ed. 995. But not in favor of one in an entirely different situation or relation, such as an employe riding on the train to do other work at another place. St. Louis &c. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. ed. 1290.

[51] Southern Ry. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. ed. 1564; Baugham v. New York &c. R. Co., 241 U. S. 237, 36 Sup. Ct. 592, 60 L. ed. 977; Texas &c. R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874; Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Philadelphia &c. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112; Luken v. Lake Shore &c. R. Co., 248 Ill. 377, 94 N. E. 175, 140 Am. St. 220, 21 Ann. Cas. 82.

[52] Schlemmer v. Buffalo &c. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 61. Compare also Chicago &c. Ry. Co. v. Brown, 185 Fed. 80. But see Schlemmer v. Buffalo &c. R. Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. ed. 596 (same case as second appeal); Cleveland &c. Ry. Co. v. Baker, 91 Fed. 224.

does not contain any provision in regard to contributory negligence; but the Federal Employers' Liability Act provides that no employe within its provisions shall be held guilty of contributory negligence in any case where the violation by the carrier of the Safety Appliance Act contributed to the injury or death of such employe. His damages can not even be decreased on account of contributory negligence in such a case.[53] Before the amendment of the Employers' Liability Act in 1908, it was held that contributory negligence was a defense where the action was founded on the violation of the Safety Appliance Act.[54] But the cases cited in the first note to this section, as well as the language of the amendment to the employers' liability statute seem to make it clear that contributory negligence is not a defense to an action under that statute for an injury caused by violation of the Safety Appliance Act; and in another case it is expressly held that the provision of the latter act abolishing assumption of risk together with the provision in the Employers' Liability Act abrogating contributory negligence as a defense render immaterial any negligence of the servant in going between cars to adjust a defective coupler.[55] As to employes not engaged in interstate commerce, however, and not within the Employers' Liability Act, it is held that con-

[53] Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. ed. 838, Ann. Cas. 1914C, 168; Southern Ry. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. ed. 1564; Norfolk &c. R. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172n.

[54] Schlemmer v. Buffalo &c. R. Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. ed. 596; Erie R. Co. v. Russell, 183 Fed. 722; Norfolk &c. R. Co. v. Hazelrigg, 184 Fed. 828; St. Louis &c. R. Co. v. York, 92 Ark. 554, 123 S. W. 376. See also Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395.

[55] Johnson v. Great Northern R. Co., 178 Fed. 643. See also Great Western R. Co. v. McCormick, 200 Fed. 375, 47 L. R. A. (N. S.) 18n; Smith v. Atlantic &c. R. Co., 210 Fed. 761, Ann. Cas. 1916A, 940; Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 N. W. 104. But if the proper appliances are furnished and in order and the employe unnecessarily goes between the cars to make the coupling he may be precluded from recovery on the ground of contributory negligence even though the company is guilty of negligence in some respect, such as permitting an obstruction or defect in the road bed.

tributory negligence may be a defense even where the safety appliance statute is violated.[56]

§ 2000. **Action for injury caused by violation of Safety Appliance Act.**—The subject of pleading practice and evidence in actions for damages for personal injuries under the statute is so far treated in the chapter on the Federal Employers' Liability Act that it is unnecessary to consider it at any great length here. The state courts as well as federal courts have jurisdiction over actions for personal injuries caused by violation of the Federal Safety Appliance Acts,[57] and they must take judicial knowledge of such statutes and apply them in a proper case.[58] The burden is upon the plaintiff to show a violation of the statute and that it was a proximate cause of the injury complained of in an action based wholly on that ground.[59] This is usually a question for the jury.[60]

Gilbert v. Burlington &c. R. Co., 128 Fed. 529. See also Suttle v. Choctaw &c. R. Co., 144 Fed. 668. But compare Chicago &c. Ry. Co. v. Brown, 185 Fed. 81. See also as to proximate cause Donegan v. Baltimore &c. R. Co., 165 Fed. 869.

[56] Popplar v. Minneapolis &c. R. Co., 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D, 383, and note, affd. in 237 U. S. 369, 35 Sup. Ct. 609, 59 L. ed. 1000. See also Chicago &c. R. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. ed. 1204.

[57] St. Louis &c. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. ed. 1061; Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Southern Pac. Co. v. Allen, 48 Tex. Civ. App. 66, 106 S. W. 441.

[58] Kansas City &c. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 N. W. 104; Turritten v. Chicago &c. R. Co., 95 Minn. 408, 104 N. W. 225; Elmore v. Seaboard &c. Ry. Co., 130 N. Car. 506, 41 S. E. 786. See as to pleading generally, Voelker v. Chicago &c. Ry. Co., 116 Fed. 867; Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Felt v. Denver &c. R. Co., 48 Colo. 249, 110 Pac. 1136; Lewis v. Pennsylvania R. Co., 220 Pa. St. 317, 69 Atl. 821, 18 L. R. A. (N. S.) 279n, 13 Ann. Cas. 1142.

[59] Voelker v. Chicago &c. Ry. Co., 116 Fed. 867; Campbell v. Spokane &c. R. Co., 188 Fed. 516; Donegan v. Baltimore &c. R. Co., 165 Fed. 869; Chicago &c. Ry. Co. v. King, 169 Fed. 372; Elmore v. Seaboard &c. R. Co., 132 N. Car. 865, 44 S. E. 620; Lyon v. Charleston &c. Ry., 77 S. Car. 328, 56 S. E. 12, 18.

[60] Donegan v. Baltimore &c. R. Co., 165 Fed. 869; Southern Ry. Co. v. Carson, 194 U. S. 136, 24 Sup. Ct. 608, 48 L. ed. 907; Erie R. Co. v. Russell, 183 Fed. 722; Thornbro v.

§ 2001. Suit for penalty.—There has been some question as to whether a suit by the United States for the statutory penalty is a civil action or a criminal prosecution; but it is now pretty well settled that it is a civil action and that the violation of the statute is not required to be shown beyond a reasonable doubt.[61] It has been held that a joint action may be maintained against two or more companies hauling the same car in a continuous passage over their roads.[62] And, as already shown in another section the car rather than the train is the unit of offense, and the carrier may be held liable for the stat-

Kansas City &c. R. Co., 91 Kans. 684, 139 Pac. 410, Ann. Cas. 1915D. 314n. For cases in which the evidence was held sufficient to make at least a prima facie case, see Mobile &c. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Montgomery v. Carolina &c. R. Co., 163 N. Car. 597, 80 S. E. 83; Blackburn v. Cherokee Lumber Co., 152 N. Car. 361, 67 S. E. 915. See also Voelker v. Chicago &c. Ry. Co., 116 Fed. 867; Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58, 116 N. W. 104; Popplar v. Minneapolis &c. Ry. Co., 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D. 383n. For cases in which it was held that the statute did not apply or the evidence was not sufficient, see Briggs v. Chicago &c. Ry. Co., 125 Fed. 745; Midland &c. R. Co. v. Fulgham, 181 Fed. 91, L. R. A. 1917E, 1n. To the effect that the statute may apply in favor of others than employers, see Chicago &c. Ry. Co. v. King, 169 Fed. 372; Atchison &c. Ry. Co. v. United States, 172 Fed. 194, 27 L. R. A. (N. S.) 756n.

[61] United States v. Chicago &c. R. Co., 162 Fed. 775; United States v. Louisville &c. R. Co., 162 Fed. 185, affd. in 174 Fed. 1021; United States v. Nevada &c. R. Co., 167 Fed. 695; United States v. Central of Ga. Ry. Co., 157 Fed. 893; Atlantic Coast Line Ry. Co. v. United States, 168 Fed. 175; United States v. Atlantic Coast Line R. Co., 182 Fed. 284; St. Louis &c. Ry. Co. v. United States, 183 Fed. 770. See also Hepner v. United States, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. ed. 720, 27 L. R. A. (N. S.) 739n, 16 Ann. Cas. 960; Chicago &c. R. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. ed. 582. But see United States v. Chicago &c. Ry. Co., 156 Fed. 180; Atchison &c. R. Co. v. United States, 172 Fed. 194, 27 L. R. A. (N. S.) 756. (A prosecution for a criminal offense and a verdict can not be directed against the defendant). As to the evidence and sufficiency of proof see United States v. Philadelphia &c. R. Co., 160 Fed. 696; United States v. Montpelier &c. R. Co., 175 Fed. 874; United States v. Illinois Cent. R. Co., 170 Fed. 542.

[62] United States v. Chicago &c. R. Co., 143 Fed. 353. See also Chaffee &c. v. United States, 18 Wall. (U. S.) 516, 538, 21 L. ed. 908.

utory penalty for each car not properly equipped and hauled in violation of the statute.[63]

§ 2002. Other acts—Ash pan and boiler inspection acts.—There are other state and federal acts somewhat similar to those hereinbefore considered, but the acts already treated are those usually meant by the term "safety appliance acts," and the more important of the other acts upon the general subject, such as the "Hours of Labor Act" and the "Workmen's Compensation Acts," will be treated in separate chapters. It may be well, however, to briefly refer to the "Federal Ash Pan Act" approved May 30, 1908, entitled "an act to promote the safety of employes on railroads," the "Boiler Inspection Law," enacted by Congress and approved February 17, 1911, entitled "An Act to promote the safety of employees and travelers upon railroads by compelling carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto," and the "Full Crew Act" of some of the states. The ash pan act provides that "it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive"; and that it shall be unlawful for any common carrier by railroad in any Territory of the United States or of the District of Columbia to use any locomotive not so equipped; that any such common carrier using any locomotive in violation of the Act shall be liable to a penalty of $200, for each and every violation, to be recovered by suit brought by the United States district attorney in the United States district court having jurisdiction in the locality where such violation is committed, and it is made his duty to bring such suit on verified information lodged with him, and the duty of the Interstate Commerce Commission to lodge information with him of any such violation coming to its knowledge and to enforce the provisions of the Act. The term "common carrier" is defined

[63] Ante § 1996; United States v. Chicago &c. Ry. Co., 162 Fed. 775; Atlantic Coast Line R. Co. v. United States, 168 Fed. 175.

to include a receiver or receivers and other persons or corporations charged with the duty of the management and operation of the business of a common carrier. But it is provided that the Act shall not apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary. The provisions of the boiler inspection act are expressly made to "apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States." The term "railroad" as used in the Act includes all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and it is provided that the term "employees" as used in the Act "shall be held to mean persons actually engaged in or connected with the movement of any train." It is made "unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." Provision is made for the appointment of inspectors by the President, for rules and regulations as to inspection, and duties to be performed by the inspectors, for the filing of reports, for statement by the carrier of any accident caused by boiler or appurtenances and for investigation and report of inspector

thereon, but it is provided that such reports shall not be admitted in evidence or used for any purpose in any action for damages growing out of any matter mentioned therein. And, finally, a penalty of one hundred dollars for each and every violation by the carrier of the Act or any rule or regulation, or lawful order of an inspector, made under its provisions, to be recovered by suit in the same manner as provided in the ash pan act and shown in the quotation hereinbefore made from that act. By amendment of March 4, 1915, this act was expressly made to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof." It was held before the amendment that the act did not provide for the regulation of locomotive headlights and that state laws in regard to headlights were not superseded by such act.[64] But, under the amendment, is it held by the Supreme Court of Alabama, in a recent case, that state laws in regard to headlights are superseded thereby.[65] And receivers of a railroad have been held liable to the widow of an engineer killed by a boiler explosion caused by defect in the bolts and stays designed to sustain the crown sheet.[66] In a Virginia case this act has been distinguished from the "Safety Appliance Act," and held not to impose an absolute duty on the railroad company.[67] But it is settled by the Supreme Court of the United States that this act was enacted for the safety of employes and that the risks caused by the employer failing to obey it are not assumed by them.[68]

[64] Atlantic Coast Line R. Co. v. State, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. ed. 1312.

[65] Louisville &c. R. Co. v. State (Ala.), 76 So. 505. See also Louisville &c. R. Co. v. Hughes, 201 Fed. 727, to the effect that a state act on the same subject of locomotive boilers, making some additional requirements on the subject, was superseded by this act.

[66] Lancaster v. Carroll (Tex. Civ. App.), 211 S. W. 797.

[67] Virginian Ry. Co. v. Andrew's Admx., 118 Va. 482, 87 S. E. 577 (and the burden is upon the plaintiff to show negligence).

[68] See Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, Ann. Cas. 1915B, 475, 478; Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. 629; Great Northern R. Co. v. Donaldson, 246 U. S. 121, 38 Sup. Ct. 230, 62 L. ed. 616, Ann. Cas. 1918C, 581; and ante, § 1967. But it is held in a very recent case that the Act does not apply where a boiler foreman

§ 2003. Full Crew Acts.—In a number of the states there are statutes, generally known as "Full Crew Acts," providing that trains shall be properly manned by a full crew consisting of a specified number of employes, depending, under some of the statutes, on the nature of the train, number of cars or other circumstances. These statutes are for the purpose of promoting the safety of employes and travelers, and have been upheld in a number of cases as constitutional.[69] So where railroad companies whose lines were less than fifty miles in length were excepted from its provisions, the statute was held constitutional and valid.[70] And a statute providing that no railroad company owning switching yards or terminals in cities where cars were switched across public crossings should operate or switch cars with less than six employes was likewise held valid as a proper exercise of the police power of the state.[71] Most of the statutes are not limited to purely interstate trains or traffic, but this does not render them invalid as an unconstitutional regulation of interstate commerce. In the absence of action on the subject by Congress, the states in the exercise of their police power, may enact reasonable laws of this kind, not constituting burdens on or direct regulations of interstate commerce, and, as Congress has not acted on this particular subject, the full crew acts being in aid of interstate commerce rather than an obstruction to it, are not invalid merely because they apply to interstate as well as local traffic.[72] The California "Full Crew Act" requiring two brakemen on a train "where four passenger coaches or cars ex-

whose duty it was to inspect and repair washout plugs was injured while attempting to tighten them while there was a heavy pressure of steam in the boiler, and that he assumed the risk, notwithstanding the engine was being prepared for interstate traffic at the time but was not in active service in moving traffic nor being used at the time in moving interstate or foreign traffic. Flack v. Atchison &c. Ry. Co. (Mo.), 224 S. W. 415.

[69] Chicago &c. R. Co. v. State, 86 Ark. 412, 111 S. W. 456, affd. in 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. 275; Pittsburgh &c. R. Co. v. State, 172 Ind. 147, 87 N. E. 1037; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 Atl. 775, 49 L. R. A. (N. S.) 977. See also St. Louis &c. R. Co. v. State, 114 Ark. 486, 170 S. W. 580.

[70] Chicago &c. R. Co. v. State, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. 275.

[71] St. Louis &c. Ry. Co. v. State, 240 U. S. 518, 60 L. ed. 776, 36 Sup. Ct. 443.

[72] Chicago &c. R. Co. v. State,

clusive of railroad officials' private cars, or more than four passenger cars are hauled, has been held constitutional and valid, but not applicable so as to prevent a train with three passenger coaches and a baggage car from being operated with one brakeman.[73] And the South Carolina Act requiring one brakeman to every two cars on passenger trains and one brakeman to be on the last car of every freight train, has been held inapplicable to mixed trains.[74]

219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. 275. See also St. Louis &c. Ry. Co. v. State, 240 U. S. 518, 60 L. ed. 776, 36 Sup. Ct. 443, and other cases cited in preceding notes. Notwithstanding Congress has legislated very largely in regard to the equipment and management of interstate trains, in its safety appliance acts, Federal Employers' Liability Act, and the like, the particular subject of full crews seems not to have been touched, and been so far left to the states.

[73] Ex parte Galvin, 162 Cal. 331, 122 Pac. 961.

[74] Joyner v. South Carolina R. Co., 26 S. Car. 49, 1 S. E. 52.

CHAPTER LX

HOURS OF SERVICE ACT AND ADAMSON LAW

Sec.
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§ 2005. **Provisions of Act—Constitutionality.**—By the Federal Hours of Service Act of March 4, 1907, it is provided that it shall be unlawful for any common carrier, its officers or agents, subject to the act to require or permit any employe subject to the Act to be or remain on duty for a longer period than sixteen consecutive hours. "Whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, That no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices,

places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period or not exceeding three days in any week: Provided further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case." Any such common carrier, its officer or agent, is made liable to a penalty for each and every violation of the Act of not less than $100 nor more than $500, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed, but no suit shall be brought after the expiration of one year from the date of such violation. In such prosecutions the carrier shall be deemed to have knowledge of all acts of its officers and agents. It is also made the duty of the Interstate Commerce Commission to enforce the provisions of the Act. But the statute contains a proviso to the effect that the provisions of the act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time such employe left a terminal, and which could not have been foreseen; nor to the crews of wrecking or relief trains. The Act is expressly made applicable to any common carrier or carriers, their officers, agents and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or District of Columbia to any other State or Territory of the United States or District of Columbia, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" is defined in the Act as including all bridges and ferries used or operated in connection with any railroad

and also the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and it is provided that the term "employees" shall be held to mean persons actually engaged in or connected with the movement of any train.[1] The statute is constitutional.[2]

§ 2006. Construction and application of the Act.—The Federal Hours of Service Act is highly remedial, and, notwithstanding a penalty is prescribed for its violation, it should be liberally construed to effect its purpose.[3] Its purpose is to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes engaged in or connected with the movement of any train and thus preventing dangers and accidents to employes and travelers from fatigue and inefficiency of such employes arising from overwork and lack of adequate rest.[4] A receiver of a railroad is a common carrier within the statute.[5] So, whether a terminal railroad company is a common carrier or not depends upon what it does rather than upon whether its charter so declares it or on how the state of its incorporation considers it, and such a company is not excluded from the operation of the Hours of Service Act by reason of its independent ownership nor by the fact that

[1] 34 Stat. at L. 1415, 39 Stat. at L. 61, 721, 722; Barnes' Fed. Code §§ 8089-8096.

[2] Baltimore &c. R. Co. v. Interstate Com. Com., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878 (also holding that the Interstate Commerce Commission has authority under the statute to require reports as to time employes have been kept on duty); United States v. St. Louis &c. Ry. Co., 189 Fed. 954.

[3] Atchison &c. R. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. ed. 1175, Ann. Cas. 1918C, 794n; United States v. St. Louis &c. Ry. Co., 189 Fed. 954; United States v. Kansas City &c. Ry. Co., 189 Fed. 471; United States v. Atlantic Coast Line Co., 224 Fed. 160; note in Ann. Cas. 1915D, 456.

[4] Atchison &c. R. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. ed. 1175, Ann. Cas. 1918C, 794n; Southern Pac. Co. v. United States, 222 Fed. 46; United States v. Pennsylvania R. Co., 239 Fed. 761 (and does not depend on local conditions); United States v. Missouri &c. R. Co., 241 Fed. 302; note in Ann. Cas. 1915D, 456. It is said in Pennsylvania R. Co. v. United States, 246 Fed. 881, that the courts in construing the statute should take into consideration the unusual conditions caused by war.

[5] United States v. Ramsey, 197 Fed. 144, 42 L. R. A. (N. S.) 1031.

its service is performed under contracts with railroad companies as agents for them and that cars are furnished by such companies; and its switching crews in moving a locomotive, with seven or eight cars attached, between its docks and warehouses or team tracks nearly a mile away are engaged in moving a "train" within that Act.[6]

§ 2007. Federal Act supersedes state laws.—State laws regulating hours of service of interstate employes within the Federal Hours of Service Act are superseded by it, and this is true although the state statute raises the limit of safety because of special local conditions and may be said to be supplementary to the federal act. The latter prescribes the measure of what Congress deems necessary and admits of no supplement.[7]

§ 2008. Employes subject to Act.—In a general way it may be said that the act embraces any employe engaged in or connected with the movement of any train in interstate transportation by a common carrier, but not intrastate railroads and employes engaged wholly in local business or employes not connected with the movement of any train. An employe may be engaged in interstate commerce and yet not connected with the movement of any train, and, hence, not within the statute.[8] The employes to which the act refers, embracing the persons described in the last sentence in section one, "are those engaged in the transportation of passengers or property by railroad in

[6] United States v. Brooklyn Eastern Dist. Term. Co., 249 U. S. 296, 39 Sup. Ct. 283, 63 L. ed. 613. See also United States v. Atlantic Terminal Co., 260 Fed. 779. See generally as to when the commerce is interstate; Northern Pac. R. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237; United States v. Chicago &c. R. Co., 218 Fed. 701 (not); United States v. Chicago &c. R. Co., 197 Fed. 624; State v. Chicago &c. R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326.

[7] Erie R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 765, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138n. See also State v. Missouri Pac. R. Co., 212 Mo. 658, 111 S. W. 500, 126 Am. St. 580; State v. Chicago &c. R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326.

[8] Schweig v. Chicago &c. R. Co., 216 Fed. 750. See also United States v. Chicago &c. Ry. Co., 218 Fed. 701; United States v. Chicago &c. R. Co., 219 Fed. 632.

the district, territorial, interstate, or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted."[9] In a recent textbook it is said: "Train dispatchers, conductors, engineers, firemen, brakemen, telegraphers, yard men, switch tenders, tower men, block signal operators, and train baggage men who are employes of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness when called upon to perform any duty connected with the movement of any train, are within the provisions of the statute."[10] But it should be noted that the same limitations of hours of service do not apply to all such employes, some being in one class and some being in another class as will hereinafter be shown, so that it must not be understood that all are within the same provision when it is said that they are all within the provisions of the statute.

§ 2009. **When employe is on duty.**—When an employe within the statute has been continuously on duty for sixteen hours he must be relieved and not required or permitted to go on duty until he has had at least ten consecutive hours off duty; and if he has been on duty sixteen hours in the aggregate in any twenty-four hour period he must not continue or go on duty again without having at least eight hours off duty. This

[9] Baltimore &c. R. Co. v. Interstate Com. Com., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878, where the court also says: "The section, in effect, thus provides: 'This act shall apply to any common carrier or carriers, their officers, agents, and employes (meaning by "employes" persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by "railroad" to include all bridges and ferries used or operated) in the District of Columbia or any territory or from one state to any other state, etc."

[10] 2 Robert's Fed. Liability of Carriers, § 893. Whether it is strictly accurate in all respects or not, this serves to give a good idea of the different employes that have so far been held within the statute. Among the cases cited by Mr. Roberts are the following: Chicago &c. R. Co. v. United States, 244 Fed. 945; United States v. Missouri Pac. R. Co., 244 Fed. 38; Denver &c. R. Co. v. United States, 236 Fed. 685; Chicago R. I. &c. R. Co. v. United States, 226 Fed. 27;

provides for two separate and distinct periods of duty.[11] An employe is generally held to go on duty when he reports for work as required and to remain on duty not only as long as he is performing any service about the train in the course of such duty but also as long as he is held responsible for its performance.[12] Thus, an employe is on duty where he is at his post ready to perform his work in obedience to rules or orders of his superior even though he is there under such requirement waiting for further orders or for the removal of some hindrance or in response to a rule requiring him to report thirty minutes before the leaving time of his engine or the like.[13] But employes "dead-heading" on a train and not required to perform or held responsible for any duty in connection with such train are not on duty with regard to it.[14] A few minutes lay off or even a somewhat longer and indefinte period in which employes are not actually at work will not necessarily break the continuity of the service;[15] and it has even been held that

Northern Pac. R. Co. v. United States, 213 Fed. 577; San Pedro &c. R. Co. v. United States, 213 Fed. 326, Ann. Cas. 1914D, 1238; St. Joseph &c. R. Co. v. United States, 232 Fed. 349. See also Missouri &c. R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. ed. 144; United States v. Atlantic Terminal Co., 260 Fed. 779.

[11] Southern Pac. Co. v. United States, 222 Fed. 46.

[12] Missouri &c. Ry. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. ed. 144; United States v. Illinois Cent. R. Co., 180 Fed. 630; San Pedro &c. R. Co. v. United States, 213 Fed. 326, Ann. Cas. 1914D, 1238.

[13] United States v. Illinois Cent. R. Co., 180 Fed. 630; United States v. Chicago &c. Ry. Co., 195 Fed. 783; Missouri &c. R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. ed. 144. See also Denver &c. R. Co. v. United States, 233 Fed. 62 (on duty though resting and eating while waiting for a derrick with which they were to work).

[14] Osborne's Admr. v. Cincinnati &c. R. Co., 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1914D, 449. See also South Covington R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, 35 Sup. Ct. 158, Conference Rule 74. A fireman remaining on an engine for the purpose of keeping up fire and steam and watching the engine, while the other members of the crew are laid off for rest because of the sixteen-hour law, is on duty connected with the movement of the train within the statute. Northern Pac. R. Co. v. United States, 213 Fed. 577.

[15] United States v. Chicago &c. Ry. Co., 197 Fed. 624; United States

a release of a train crew for two hours at a terminal does not break the continuity of the service.[16] As a general rule if the time is so short and the circumstances are such that the employe does not have the opportunity for rest such as the statute requires the continuity of the service is not broken, but if they are such that he is thus relieved and given a substantial period of rest it is otherwise, and the question has been held for the jury under the circumstances of the particular case.[17]

§ 2010. Service of another kind after statutory period.—An employe within the statute can not be required or permitted to perform railroad services of any kind beyond the time limited by the statute, and the carrier cannot evade the statute by the commingling of interstate and intrastate operations or by shifting him around and occupying the hours required by the statute for rest with railroad services of another kind.[18] Thus, it has been held that twelve hours of continuous mixed work as train dispatcher and ticket seller is a violation of the statute limiting train dispatchers to nine hours in any twenty-four hour period, and that the statute can not be evaded by the carrier requiring of the employe six consecutive hours of work as a train dispatcher and six hours of consecutive duty as a ticket seller.[19]

§ 2011. Operator's proviso—Employes handling orders affecting train movements—Emergency.—Special provision is made by what is sometimes called the "operators' proviso," for a shorter limitation of hours of service in the case of operators,

v. Northern Pac. R. Co., 213 Fed. 539. See also United States v. Atchison &c. Ry. Co., 220 U. S. 37, 44, 31 Sup. Ct. 362, 363, 55 L. ed. 361.

[16] Minneapolis &c. R. Co. v. United States, 245 Fed. 60 (but one of the judges dissented in this case).

[17] United States v. Chicago &c. R. Co., 197 Fed. 624; United States v. Denver &c. R. Co., 197 Fed. 629. See also Missouri &c. R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. ed. 144.

[18] Baltimore &c. R. Co. v. Interstate Com. Com., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878; San Pedro &c. R. Co. v. United States, 213 Fed. 326, Ann. Cas. 1914D, 1238. But compare United States v. Chicago &c. R. Co., 219 Fed. 632.

[19] Delano v. United States, 220 Fed. 635. See also Great Northern R. Co. v. United States, 213 Fed. 577.

train dispatchers, and other employes who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, and it is made unlawful to require or permit them to be or remain on duty for more than nine hours in any twenty-four in all towers, offices, places and stations continuously operated day and night, or for more than thirteen hours in towers, offices, places, and stations operated only during the daytime, except that in case of emergency, they may be permitted to be or remain on duty for four additional hours in twenty-four, or not exceeding three days in any week.[20] There is a difference of opinion among the courts as to whether the term "other employe" used in the statute in this connection includes only an employe whose primary and principal duty is to dispatch, report, transmit, receive, or deliver such orders or extends to one who does so even where it is not his principal or primary duty. Some of the federal courts have held that employes of the former class are governed by the other provisions of the statute and not by this proviso.[21] Others have held that it may include an employe who transmits such orders by telephone although it is not his principal or primary duty, especially if he regularly and habitually does so.[22] The emergency contemplated by this proviso, in permitting four hours additional service in case of emergency, must be a real one and not caused by the fault of the carrier, but unexpected illness of another train dispatcher may create such an emergency.[23] So may insubordination of another train dispatcher.[24]

§ 2012. Telegraph offices—Day and night—Separate periods

[20] See United States v. Florida &c. R. Co., 222 Fed. 33.

[21] Missouri Pac. R. Co. v. United States, 211 Fed. 893; United States v. Florida &c. R. Co., 222 Fed. 33; United States v. Houston &c. R. Co., 205 Fed. 344.

[22] Chicago &c. R. Co. v. United States, 226 Fed. 27; Chicago &c. R. Co. v. United States, 226 Fed. 30.

[23] United States v. Southern Pac. Co., 209 Fed. 562. See also United States v. New York &c. R. Co., 216 Fed. 702.

[24] United States v. Denver &c. R. Co., 220 Fed. 293. But delay of train caused by intoxication of circus employes in loading its paraphernalia is held not. United States v. Chicago &c. R. Co., 219 Fed. 342.

of work.—Where a telegraph office or place within the "operators' proviso" is operated only in the daytime employes may remain on duty as long as thirteen hours; but where it is operated continuously throughout the day and night the operators cannot remain on continuous duty for more than nine hours of the twenty-four hour period, except in case of emergency. The question has arisen as to what is the rule where it is operated during all the daytime and only part of the night. In such cases the office is held to be a day and night office and the nine hour limitation applies.[25] So, the statute cannot be avoided or evaded by maintaining two offices or places in the same neighborhood in close proximity and operating one for a part of the time and closing the other during such time where the work is practically a unit and the office in effect one place.[26] But the statute does not require a period of continuous and unbroken rest for fifteen hours out of the twenty-four, and it is not unlawful to divide the nine hours of work into two periods if the time does not exceed nine hours in the aggregate.[27]

§ 2013. Exceptions and excuses under general proviso of § 3.—Some difference of opinion seems to exist as to whether any of the terms used in the proviso in regard to exceptions or excuses are synonymous and explanatory of any of the other terms so used;[28] but this is perhaps unimportant as the courts are pretty well agreed as to what is within the meaning of the

[25] United States v. Atlantic Coast Line R. Co., 211 Fed. 897; United States v. Grand Rapids &c. R. Co., 224 Fed. 667; United States v. Missouri Pac. Ry. Co., 208 Fed. 957. See also United States v. Baker, 261 Fed. 703. But compare United States v. Oregon Short Line R. Co., 228 Fed. 561, affirmed in 234 Fed. 584.

[26] Atchison &c. R. Co. v. United States, 236 Fed. 906; Illinois Cent. R. Co. v. United States, 241 Fed. 667. See also United States v. Baker, 261 Fed. 703.

[27] United States v. Atchison &c. R. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. ed. 361. See also United States v. Atchison &c. R. Co., 232 Fed. 196.

[28] United States v. Pennsylvania Co., 239 Fed. 761; United States v. Great Northern R. Co., 220 Fed. 630; United States v. Kansas City &c. Ry. Co., 189 Fed. 471; Denver &c. R. Co. v. United States, 233 Fed. 62.

proviso. A derailment or collision has been held to be within the exception justifying the keeping of train crews at work after the statutory period whether it is due to unavoidable accident, the act of God, or the negligence of the carrier.[29] But ordinary delays from causes incidental to the operation of trains do not of themselves come within the exceptions or justify the carrier in keeping employes at work longer than the statutory period.[30] It is only where they could not have been foreseen and prevented by the exercise of reasonable foresight and diligence, that the carrier is excused;[31] and it is said that this must be as high a degree as may be consistent with the object aimed at and the practical operation of the railroad.[32] And where any casualty occurs the carrier must still use all reasonable diligence to avoid keeping its employes on duty over the statutory time.[33] It has also been held in a very recent case that in an action against officer or agents of the company to enforce the penalty, the defense that the case was one of unavoidable acci-

[29] Denver &c. R. Co. v. United States, 233 Fed. 62; United States v. Northern Pac. R. Co., 215 Fed. 64.

[30] Denver &c. R. Co. v. United States, 233 Fed. 62; Atchison &c. R. Co. v. United States, 243 Fed. 114; Great Northern R. Co. v. United States, 218 Fed. 302, L. R. A. 1915D, 408; United States v. Southern Pac. Co., 209 Fed. 562. Thus, hot boxes, unusual traffic, head winds, and imperfect working of engine are causes of delay incidental to operation and not within the exception. Great Northern R. Co. v. United States, 218 Fed. 302. L. R. A. 1915D, 408. And so are poor coal, delays in meeting trains, switching, leaky flues, broken rods and pins, bursted hose, and the like. Denver &c. R. Co. v. United States, 233 Fed. 62, citing the cases.

[31] Atchison &c. R. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. ed. 1175, Ann. Cas. 1918C, 794n; United States v. Kansas City &c. R. Co., 202 Fed. 828.

[32] United States v. Kansas City &c. R. Co., 202 Fed. 828. See also Baltimore &c. R. Co. v. United States, 243 Fed. 153; United States v. Atchison &c. R. Co., 236 Fed. 154.

[33] Atchison &c. R. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635. 61 L. ed. 1175, Ann. Cas. 1918C, 794; Denver &c. R. Co. v. United States, 233 Fed. 62; Baltimore &c. R. Co. v. United States, 242 Fed. 1; United States v. Atchison &c. R. Co., 236 Fed. 154; Gulf &c. Ry. Co. v. United States, 255 Fed. 753; United States v. Geer, 268 Fed. 385. The Supreme Court of the United States held in the first case above cited that as the company could have put on a relief

dent within this proviso, is an affirmative defense, which must be specially pleaded and proved.[33a]

§ 2014. Actions for penalties.—A separate penalty is incurred for each employe kept on duty beyond the statutory limit even though they are all members of the same train crew and go on and off duty at the same time.[34] An action to recover the penalty is a civil action.[35] And the burden is upon the carrier to plead and prove any of the excuses stated in the proviso and relied on by it as a defense.[36]

§ 2015. Actions for damages for injury to person or property.—Very few actions seem to have been for damages for personal injury or loss alleged to have been caused by a violation of this statute, and there is some difficulty in determining its exact effect and application in such cases. The statute does not make the carrier an insurer of the safety of its employes and a violation of the statute does not create an unconditional liability for all accidents even though happening during the period during which the employe was kept at work beyond the statutory time; there can, therefore, be no recovery based on the statute in such cases unless it is shown that such violation was a proximate cause of the injury.[37] Even where it is said

crew at the next station from the place of the breakdown, the requirement of continued service thereafter to the final destination was not occasioned by the unforeseen accident and the company was guilty of violating the statute in so keeping the original crew in service. But compare United States v. Pennsylvania Co., 239 Fed. 761; Indiana Harbor Belt R. Co. v. United States, 244 Fed. 943.

[33a] United States v. Geer, 268 Fed. 385.

[34] Missouri &c. R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. ed. 144.

[35] United States v. Minneapolis &c. R. Co., 235 Fed. 951.

[36] United States v. Kansas City &c. R. Co., 202 Fed. 828; Atchison &c. R. Co. v. United States, 243 Fed. 114; United States v. Houston Belt &c. R. Co., 205 Fed. 344; Great Northern &c. R. Co. v. United States, 218 Fed. 302, L. R. A. 1915D, 408 and n. The question as to whether a sufficient excuse is shown by the evidence in the particular case is usually for the jury. Southern Pac. R. Co. v. United States, 222 Fed. 46; United States v. Missouri Pac. R. Co., 235 Fed. 944; Baltimore &c. R. Co. v. United States, 242 Fed. 1.

[37] St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. ed. 1179. So, in

that a violation of such a statute constitutes negligence per se there must still be a casual connection and to make such negligence actionable it must be a proximate cause of the injury for which the action is brought.[38] The liability under the Act is not limited to injuries happening while the violation of the law is going on nor does it fix the limit of possible connection between the overwork and the injury at ten hours by the provision that an employe having been continuously on duty for sixteen hours shall have at least ten consecutive hours off; and where the action is brought by an employe under the Federal Employers' Liability Law as well as the Hours of Service Act the defenses of contributory negligence and assumption of risk are excluded.[39]

§ 2016. Adamson Eight-Hour Act.—In 1916 Congress passed what is known as the Adamson Act, providing that, in contracts for labor and service, eight hours should be deemed a day's work and the measure or standard thereof for the purpose of reckoning the compensation for service of all employes of any common carrier by railroad (with certain exceptions as to the roads), and then or hereafter actually engaged in any capacity in the operation of trains on railroads (with such exceptions) engaged in interstate or foreign commerce as defined in the Act. But the statute is expressly made subject to the Interstate Commerce Act as amended; and railroads independently owned and operated not exceeding one hundred miles in length,

Osborne's Admr. v. Cincinnati &c. R. Co., 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915D, 449n, it is said, though perhaps a little too broadly, that "in addition to a violation of this statute it is necessary that the plaintiff shall show some act of negligence in the part of the defendant that, concurring with or independent of the violation of the act, contributed to the death of his intestate."

[38] Inland Steel Co. v. Yedinak, 172 Ind. 423, 428, 87 N. E. 229, 139 Am. St. 389, citing many other cases.

[39] Baltimore &c. R. Co. v. Wilson, 242 U. S. 295, 37 Sup. Ct. 123, 61 L. ed. 312. But, as shown in the chapter on the Federal Employers' Liability Act, contributory negligence is not an absolute and complete bar. And under some of the state statutes it is held that contributory negligence or assumption of risks may be a defense and

and electric street railroads and electric interurban railroads and their employes are excepted, but railroads less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads or are themselves engaged in transfer of freight between railroads or between railroads and industrial plants are not excepted.[40] The Act has been held constitutional by the Supreme Court of the United States.[41] But not withstanding this Act, the company and its employes, where the road is insolvent and barely able to go on by paying less than the rates of wages required by such law, may make a valid agreement for such smaller rate of wages.[42]

that one who has violated a statute in regard to hours of service cannot recover under it. See Melville v. Butte &c. Copper Co., 47 Mont. 1, 130 Pac. 441; Lloyd v. North Carolina R. Co., 151 N. Car. 536, 66 S. E. 604, 45 L. R. A. (N. S.) 378. Compare also Kansas City &c. R. Co. v. Huff, 116 Ark. 461, 173 S. W. 419.

[40] 39 St. at L. 721. Provision is also made for a commission to investigate and report, and a penalty provided for violation of the act.

[41] Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024n.

[42] Ft. Smith &c. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526. See also Transportation Act 1920, Barnes' Fed. Code, Supplement §§ 8078-8088 and §§ 8088a-8088q, as to labor disputes and labor board.

CHAPTER LXI

WORKMEN'S COMPENSATION ACTS

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§ 2020. Generally.—During the last few years nearly all of the states have enacted "Workmen's Compensation Laws." There is some question as to whether railroad companies and their employes are within such statutes, especially where interstate commerce is involved, and some statutes expressly exclude employers and employes engaged in interstate commerce even if they could and would otherwise be included. For this reason it is not our purpose to consider the subject as fully as we might otherwise treat it. But, as we think most of the statutes are broad enough to include railroad employment, at least of some kinds, and, as the subject is of great and growing importance in the law of master and servant, it seems advisable to undertake a fairly comprehensive treatment of it, although no attempt will be made to consider the practice under such acts, which varies considerably in different jurisdictions.

§ 2021. Nature and kinds of statutes.—These laws are of two general classes, dependent on their methods of administration, to-wit: state insurance and direct payment. Under the first of these schemes, the fund for the payment of the claims is derived from premiums paid by the employer and his employes to the state and disbursed by a commission appointed and supported by the state. Under the second scheme the payment is made directly to the injured employe by his employer or by an indemnity insurance company retained by the employer where that method is sanctioned by the law. A few statutes have alternative provisions partaking of the nature of both classes. Under both methods the law usually fixes the amount of the award for specific injuries. The courts in most instances are given only a limited participation in the procedure and the jurisprudence of the subject has been developed largely in the decisions and orders of the boards and commissions charged with the administration of the law, although there are now many decisions of the courts on various phases of the subject. The right to the compensation does not in general depend in any manner on negligence, except in the rare case of wilful negligence on the part of the employer, when provision is made for an increase of the award. Wilful contributory negligence or intoxication of the servant may, however, cause a diminution or an entire denial of all compensation under most of the statutes. Employers who do not accept the law are deprived in most instances of the right to interpose the common-law defenses of assumption of risk, fellow servant and contributory negligence, either altogether or to some extent. Several of the statutes of the insurance class are compulsory but nearly all of those of the other class are elective, most of them permitting such election on the part of both employer and employe. Some of them require the election to be made affirmatively and others presume an election to come under the statute unless the election not to do so is affirmatively made. The provision abolishing or modifying most of the common law defenses if the employer elects not to come under the statute usually has the practical effect of making him elect to come under the statute.[1]

[1] See De Francesco v. Piney Mining Co., 76 W. Va. 756, 86 S. E. 777, note in L. R. A. 1916A, 27, 213, 214. In Ashton v. Boston &c.

§ 2022. **Constitutionality.**—In a pioneer case the New York law was held unconstitutional by the Court of Appeals on the ground that it was an attempt to make an employer liable to an employe, for injury arising out of a necessary risk or danger of the employment, or one inherent in the nature thereof, without fault on the part of the employer, unless it was caused by the serious and wilful misconduct of the employer, and that it was an unconstitutional taking of liberty and property without due process of law.[2] The decision in this case soon met with much criticism,[3] and in 1914 another workmen's compensation act was passed in New York, which has recently been held constitutional and valid although compulsory.[4] The court shows that it differs in material and vital respects from the act involved in the Ives case, and in the course of the opinion it is said: "This act protects both employer and employe, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases, and from the certainty of defeat if unable to establish a case of actionable negligence. * * * In this case the mutual benefits are direct. Granted that employers are compelled to insure, and that there is in that sense a taking. They insure themselves and their employes from loss, not others." In Massachusetts a statute (passed July 28, 1911) applicable to all employment except domestic service and farm labor, establishes a scheme for providing, through the instrumentality of a corporation established for that purpose, entitled the "Massachusetts Employees' Insurance Association," and a subscription of employers thereto, for compensation to employees for personal injuries received by them in the course of their employment

R. Co., 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281, Ann. Cas. 1916C, 834, it is said that the contractual assumption of risks is not a matter of defense, but can be shown under the general denial, and is not affected by the Workmen's Compensation Act.

[2] Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

[3] See 24 Harvard Law Review, 649; 10 Columbia Law Review, 753.

[4] Jensen v. Southern Pac. R. Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276n, 53 New York Law Jour. 100 (July 28, 1915). In the meantime New York, like several other

and not due to serious and wilful misconduct. The scheme is made effective by a provision that in actions for damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained against an employer who shall not have become a subscriber to the insurance association, or who shall not have otherwise insured his liability to pay compensation, "it shall not be a defense, (1) that the employee was negligent; (2) that the injury was caused by the negligence of a fellow employee; (3) that the employee had assumed the risk of the injury"; and by a further provision that "an employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription." Before its passage this statute was submitted to the justices of the supreme court of Massachusetts for their opinion as to its constitutionality. The justices held that construing the provision abrogating the defenses of contributory negligence and the fellow-servant rule as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and wilful misconduct which, under the provisions of the act, will deprive an employee of compensation (and neither expressing nor intimating an opinion whether it would be unconstitutional if otherwise construed), and in view of the fact that there is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employe to waive his right of action at common law and accept the compensation provided for in the act (upon which ground it is differentiated from the New York statute) the statute is not obnoxious to the due process provisions of either the state constitution or the Fourteenth Amendment of the Constitution of the United

states, had adopted a constitutional amendment authorizing a workmen's compensation act, but the court sustains this act as not in violation of the constitution of the United States, and, apparently, as

States.[5] The Washington workman's compensation act of March, 1911, provides, in lieu of a civil action, for the compensation of a workman sustaining injury other than that resulting from his own deliberate intention, and irrespective of any negligence on the part of his employer, in extra-hazardous employments, which, as enumerated by the statute, include all classes of business in which machinery is employed; such compensation to be paid out of an insurance fund created by an assessment upon employers proportioned to the hazards of their business and the amount of their pay rolls. The constitutionality of this statute has been affirmed as against the objection that it violates the due process and equal protection clauses in the state and Federal Constitution, as well as constitutional provisions for equal and uniform taxation of property according to value, and guaranteeing the inviolability of the right to trial by jury.[6] It has been held with practically no dissent that it is within the power of the legislature in such statutes to abolish the defense of assumption of risks and the like.[7] The Michigan statute has been held constitutional although it includes the

valid even under the New York constitution without any amendment. See also Stoll v. Pacific Coast &c. Co., 205 Fed. 169; Young v. Duncan, 218 Mass. 346, 106 N. E. 1, Ann. Cas. 1916B, 75n; Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, Ann. Cas. 1913A, 983n; Porter v. Hopkins, 91 Ohio St. 74, 109 N. E. 629; Davis &c. Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

[5] Opinion of Justices, 209 Mass. 607, 96 N. E. 308. See also Madden v. M. J. Whittall Carpet Co., 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000.

[6] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. See also Mountain Timber Co. v. Washington, 243 U. S. 219, 31 Sup. Ct. 260, 61 L. ed. 699, Ann. Cas. 1917D, 642.

[7] State, ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, Ann. Cas. 1913A, 983n; Opinion of Justices, 209 Mass. 607, 96 N. E. 308; Borgins v. Falk Co., 147 Wis. 327, 37 L. R. A. (N. S.) 489, 133 N. W. 209; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State v. Mountain Lumber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10n, Ann. Cas. 1915B, 1230n. See also Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Mondou v. New York &c. R. Co., 223 U. S. 1, 32

state and each county, city, township, incorporated village, and school district, and each incorporated public board or public commission as employers and although such bodies or divisions are not given the right of election as to whether they will operate under the provisions of the act while private employers are given such right of election.[8] The constitutionality of such statutes, when elective or optional, even though they deprive the employer of the defenses of assumption of risk, contributory negligence, or fellow servant when the provisions of the statute are not accepted, is so thoroughly considered and settled in numerous cases as against almost every imaginable objection, that a further review of the authorities here is unnecessary.[9]

Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; Consumers Lignite Co. v. Grant (Tex. Civ. App.), 181 S. W. 202; De Francesco v. Piney Mining Co., 76 W. Va. 756, 86 S. E. 777; Watts v. Ohio Val. Elec. R. Co., 78 W. Va. 144, 88 S. E. 659. The Minnesota and New Jersey acts are elective and they, like similar elective acts in other states, have been held constitutional. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 N. W. 71; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 Atl. 451, affirmed in 91 Atl. 1070; Troth v. Millville Bottle Works, 86 N. J. L. 558, 91 Atl. 1037. In State v. District Ct., 131 Minn. 96, 154 N. W. 661, it is held that the right to recover compensation for death, given by the amendment of the Minnesota act in 1915, is a new right created by the death rather than the injury and is governed by the law in force on the day of the death rather than that in force at the time of injury.

[8] Wood v. City of Detroit, 188 Mich. 547, 155 N. W. 592, L. R. A. 1916C, 388. See also Butte v. Industrial Acc. Board, 52 Mont. 75, 156 Pac. 130.

[9] The subject is elaborately considered and the authorities are reviewed in the notes in L. R. A. 1916A, 409, L. R. A. 1917D, 51, Ann. Cas. 1915A, 247. Among the most carefully considered cases holding such acts constitutional, in addition to those already cited, are the following: Jefferson Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. ed. 678, Ann. Cas. 1917D, 637; Hunter v. Colfax &c. Coal Co., 175 Iowa 245, 154 N. W. 1037, L. R. A. 1917D, 15, Ann. Cas. 1917E, 1077n; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412; Sayles v. Foley, 38 R. I. 484, 96 Atl. 340; Middleton v. Texas Power &c. Co., 108 Tex. 96, 185 S. W. 556. See also Chicago R. Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534; Keeran v. Peoria &c. Trac. Co., 277 Ill. 413, 115 N. E. 636. But see Kentucky State Journal Co. v. Workman's Compensation Board, 161 Ky. 562,

It has been settled by the Supreme Court of the United States in recent decisions, that such an act is not necessarily unconstitutional even if it is compulsory, and that it does not violate the Fourteenth Amendment in not giving a trial by jury, nor in excluding farm laborers and domestic servants from its compulsory scheme.[10] And it has very recently been held by that court, through the court divided five to four, that the Arizona law requiring the employer, in effect to assume the pecuniary risk of injury or death of the employe from hazards of the specified inherently hazardous employments, is valid and the employer is not deprived of property without due process of law nor denied equal protection merely because the employe, under the state law, may pursue any one of three avenues of redress, according to the facts, namely, to enforce the common law lia-

170 S. W. 1166, L. R. A. 1916B, 389, Ann. Cas. 1916B, 1273n; apparently holding in the original opinion that the statute is compulsory and invalid as taking away the employer's option if he does not accept and apparently holding that on petition for rehearing that it is unobjectionable as to the employer but invalid as compulsory, and for other reasons, as to the employe. Compare, however, Green v. Caldwell, 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 1125n. As shown in the note in Ann. Cas. 1916B, 1286, citing the decisions up to the date of the note, the statutes of California, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Washington, West Virginia and Wisconsin have been held constitutional. And in recent cases the statutes of Indiana, Oklahoma and Pennsylvania have also been upheld. Adams v. Iten Biscuit Co., 63 Okla. 52, 162 Pac. 938; Anderson v. Carnegie Steel Co., 255 Pa. 33, 99 Atl. 215. See also note in Ann. Cas. 1918B, 612. Many of the decisions are based upon the broad ground that injuries to workmen and their deaths caused by accident in the business may properly be regarded as part of the expense of the business and be borne by it.

[10] New York Cent. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Lumber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685, Ann. Cas. 1917D, 642. See also Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. 255, Ann. Cas. 1917D, 637; Middleton v. Texas Power & Light Co., 249 U. S. 152, 63 L. ed. 527, 39 Sup. Ct. 227; Raymond v. Chicago &c. R. Co., 233 Fed. 239. The compulsory or partly compulsory statutes of California, Illinois, Montana, NewYork, Ohio, Oklahoma, Washington and West Virginia have been upheld by

bility, the liability under the Employer's Liability Law, or the liability under the Compulsory Compensation Law.[10a]

§ 2023. **Construction.** — Although workmen's compensation acts are in derogation of the common law yet they are highly remedial and it is generally held that they should be liberally construed.[11] But they do not, ordinarily at least, apply to injuries received before their passage.[12]

§ 2024. **Railroad employes as within Workmen's Compensation Acts.**—It was held by a divided court that the workmen's compensation act of Wisconsin, as regards its compensation features, was intended to include and does include all railway employees. This conclusion is reached after a consideration of various provisions of the act, which are set out in the opinion. The court recognizes the fact that the idea had become preva-

the state courts. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398; Grand Trunk &c. Ry. Co. v. Industrial Com., 291 Ill. 167, 125 N. E. 748; Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554 (but invalid because of the particular statute required employer to pay twice); Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276n; Adams v. Iten Biscuit Co., 63 Okla. 52, 162 Pac. 938; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 766; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10, Ann. Cas. 1915B, 1230n; Rhodes v. J. B. B. Coal Co., 79 W. Va. 71, 90 S. E. 796. Most of the statutes involved in the above cases involved compensation acts of the industrial class rather than direct liability, and in two or three of the states they were authorized by constitutional amendment.

[10a] Arizona Copper Co. v. Hammer (Arizona Employers' Liability Cases), 250 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. 553, 6 A. L. R. 1537.

[11] Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436; Sullivan Case, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; State ex. rel. Virginia R. &c. Co. v. District Ct., 128 Minn. 43, 150 N. W. 211; Donahue v. R. A. Sherman's Sons Co., 39 R. I. 373, 98 Atl. 109, L. R. A. 1917A, 76; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154n; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 143 N. W. 1054. But see contra, Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724.

[12] Arizona &c. R. Co. v. Clark, 207 Fed. 817; Moriarty v. Miller, 99 Nebr. 614, 157 N. W. 329; Birmingham v. Lehigh &c. Coal Co. (N. J. L.), 95 Atl. 242.

lent that the compensation act was not intended to apply to railway employees in general. The court said: "That has come about, doubtless, from a sentiment which grew up while the act was under consideration in the legislature, based, largely, on a lay understanding of the classification of railway employees into those engaged in shops or offices and all others found in the first part of the act, and the indifference of, or opposition from, some of the employees as well as employers, before the special committee which prepared the bill and before other legislative committees. Somehow, but just how, no one seems to comprehend, the air, so to speak, became, during the progress of the act through the legislature, charged with the idea that there was some specialization as to railway employees, and that, supplemented with the fact of railway employers having kept aloof from the matter until the appellant chose to raise the question, seems to have caused more or less of a conviction that the general class of railway employes were not within the benefit of the law."[13] As to workmen's compensation acts generally, ground for the belief that they are not designed to cover the cases of railway employees may be found in the fact that the Federal Employers' Liability Act secures to most railway employees the benefits conferred by workmen's compensation acts. In most of the states of the Union, also, there has been special legislation enlarging the common-law liability of railroad companies with respect to employees engaged in the actual operation of trains. Workmen's Compensation Acts, nevertheless, are usually drawn with sufficient breadth to cover railway employees, and as said in the case last cited[14] with reference to the Wisconsin legislation, "it would seem almost unbelievable that legislatures in providing a system to lay the burden of personal injury losses where they will be as soon as practicable absorbed into the products of industry, should leave out the most significant class of the objects of solicitude." Whether railway employees come within the purview of work-

[13] Minneapolis, etc. Ry. Co. v. Industrial Commission of Wisconsin, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655n.

[14] Minneapolis &c. Ry. Co. v. Industrial Commission of Wisconsin, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655n.

men's compensation acts is of course a matter of statutory construction in each jurisdiction. In several states they are expressly mentioned and included in the statute, and many cases under statute apparently broad enough to include them have been decided on the assumption or implied ruling that they were included.[15]

§ 2025. Effect of Federal Employers' Liability Act.—It is now settled by recent decisions of the Supreme Court of the United States that the entire subject of the liability of interstate carriers for injury or death of its employees, while engaged in interstate commerce, is so far covered by the Federal Employers' Liability Act that to this extent state laws are superseded even where there is no negligence, and compensation cannot be awarded in such a case under a state workmen's compensation act,[16] nor can the operation of the Federal Act be interfered with by the state law either by requiring carriers and their employes to elect between the provisions of the two

[15] See New York &c. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Connole v. Norfolk &c. R. Co., 216 Fed. 823; Chicago &c. R. Co. v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916F, 540; Klawinski v. Lake Shore &c. R. Co., 185 Mich. 643, 152 N. W. 213; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412, Ann. Cas. 1916B, 789n; Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 Atl. 58; State v. Chicago &c. R. Co., 80 Wash. 435, 141 Pac. 897; and railroad cases cited in subsequent sections of this chapter. But in several of these cases, as in some others, it is held that the state statute does not apply to employes engaged in interstate commerce and, as will be shown in the next section they would probably be superseded by the Federal Employers' Liability Law if they did attempt to do so or were so construed.

[16] New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; approving Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450, and disapproving New York and New Jersey cases to the contrary. Recent cases following the above decision of the Supreme Court of the United States, which is, of course, binding on the state courts, are the following; Walker v. Chicago &c. R. Co., 66 Ind. App. 165, 117 N. E. 969; Vandalia R. Co. v. Sanders, 187 Ind. 704, 121 N. E. 275; Matney v. Bush, 102 Kans. 293, 169 Pac. 1150; Rounsaville v. Central R. Co., 90 N. J. L. 176, 101 Atl. 182; Pan-

acts or imputing such an election to them by statute.[17] It has also been held by the Supreme Court of Michigan that an interstate carrier cannot even by voluntarily accepting the provisions of the state act become bound by that act.[18]

§ 2026. Right to and effect of election to accept or reject the statute.—In most, though not all, jurisdictions the statutes contain some provision rendering it optional with the parties to be affected to accept the compensation principle provided. Under some of them an employe may elect positively not to accept the provisions of the act,[19] and if he does so repudiate it he is at liberty to pursue any existing common law or statutory remedy he may have for damages.[20] The right of election which an employe would have been free to exercise if he had lived has been held to pass at his death to his administrator.[21] On the other hand, an employe coming within the provisions of the act may agree voluntarily to accept its provisions fixing and limiting his recov-

handle &c. R. Co. v. Brooks (Tex. Civ. App.), 199 S. W. 665. See also New York Cent. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188. The disputed question as to whether either the Federal Employers' Liability Act or a state compensation act applies to injuries coming within admiralty jurisdiction seems to be settled in the negative in Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E. 900, although the decision is by a divided court.

[17] Erie R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. ed. 1057, Ann. Cas. 1917D, 1139. See where employe in intrastate work was held entitled to recover under state workmen's compensation act and not under Federal Safety Appliance Act; Delaware &c. R. Co. v. Peck, 255 Fed. 261; Foley v. Hines (Me.), 111 Atl. 715.

[18] Carey v. Grand Trunk &c. R. Co., 200 Mich. 12, 166 N. W. 492. But this may admit of some doubt as to non-negligent injuries.

[19] Smith v. Western States Portland Cement Co., 94 Kans. 501, 146 Pac. 1026.

[20] Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465, Ann. Cas. 1915D, 1091n; Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443.

[21] Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443. But the administrator of a deceased servant's estate can not maintain an action for the servant's wrongful death under the Kentucky constitution where such servant had accepted the Workmen's Compensation Act fixing the amount of recovery for death and providing that it should be in lien of all other liability. Penn's Admr. v. Bates &c. Constr. Co., 183 Ky. 529, 209 S. W. 513.

ery in case of injury.[22] Under the Wisconsin statute railroads may elect to accept its provisions as to all their employes and are not limited to shop and office employes.[23] Under most of these acts both employers and employees are presumed to accept the provisions of the act unless some affirmative action on their part evidences an intention to the contrary, such action being usually the filing of certain papers with the proper state officials, indicating a repudiation of the compensation principle.[24] But in some jurisdictions a positive act is required showing an election by the parties in order to enable them to take advantage of the statute.[25] Under some of the statutes if the employer is within the terms of the statute at the time the contract of hiring is made, the employe is also deemed to be within its provisions unless he disaffirms it by some positive act.[26] And under another statute an employee is deemed to waive his right of action at common law if he does not at the time of the contract of hiring give his employer notice in writing that he claims such a right, and this whether he has notice that his employer has subscribed to the act or not; and having in this manner waived the right the employe cannot subsequently invoke it.[27]

[22] State Journal Co. v. Workmen's Compensation Board, 162 Ky. 387, 172 S. W. 674, affirming 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916B, 389, Ann. Cas. 1916B, 1273n.

[23] Minneapolis, etc. R. Co. v. Industrial Commission, 153 Wis. 552, Ann. Cas. 1914D, 665n, 141 N. W. 1119.

[24] Dietz v. Big Muddy Coal, etc. Co., 263 Ill. 480, 105 N. E. 289; Shade v. Ash Grove Lime, etc. Co., 92 Kans. 146, 139 Pac. 1193; Gorrell v. Battelle, 93 Kans. 370, 144 Pac. 244; Spottsville v. Western States Portland Cement Co., 94 Kans. 501, 146 Pac. 1026; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 N. W. 71; Harris v. Hobart Iron Co., 127 Minn. 399, 149 N. W. 662; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 Atl. 451; Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 Atl. 354; Albanese v. Stewart, 78 Misc. 581, 138 N. Y. S. 942 (construing New Jersey statute).

[25] Coakley v. Mason Mfg. Co., 37 R. I. 46, 90 Atl. 1073, Ann. Cas. 1917A, 186n. See also State ex. rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, Ann. Cas. 1913A, 983n (before late amendment); Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

[26] Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620 (construing Wisconsin statute).

[27] Young v. Duncan, 218 Mass. 346, 106 N. E. 1, Ann. Cas. 1916B,

But this waiver has been held not to operate against the parent of a minor workman for whose death the parent is suing, since the latter's right is independent of the right of the son.[28] Where an act provides that an employer may bring himself within its provisions by filing a written statement to that effect, and giving reasonable notice of his election to his workmen by posting and keeping posted copies of such statement in conspicuous places about his establishment, an employer who files his acceptance a few days before the act becomes effective and makes no effort to withdraw it must be deemed to accept the act, and is entitled to its benefits from the time it goes into effect.[29] Under a statute providing that notice of an election by an employe not to accept its benefits must be made within a certain time, otherwise he will be deemed to have accepted it, an employe who has been injured and has subsequently filed his election not to accept, will be considered as within the provisions of the statute at the time of his injury and cannot afterwards maintain an action at law therefor.[30] But it has been held that a provision that all employers and employees within the scope of an act shall be bound by and shall have every benefit and right given by the act as if a mutual agreement to that effect were entered into by the employer and workman at any time before the happening of the accident, followed by a provision that either party may disaffirm an employment under the act by written notice, the absence of which shall be deemed as indicating an employment under the act, cannot be construed to require the employe to elect, prior to the injury, which remedy he will adopt, and he may exercise his option

75n; King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170n.

[28] King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170n. See as to right of minor to make election. Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 N. Y. S. 369.

[29] Coakley v. Mason Mfg. Co., 37 R. I. 46, 90 Atl. 1073, Ann. Cas. 1917A, 186n.

[30] Harris v. Hobart Iron Co., 127 Minn. 399, 149 N. W. 662. But under a statute not saying when notice of election should be filed it has been held that a notice filed by the employer after an accident, but several months before a proceeding was brought thereunder, was sufficient. State v. District Court, 133 Minn. 402, 158 N. W. 615.

after the accident and injury.[31] Where a servant was injured Oct. 7, 1912, and the employer did not elect to come under the Workmen's Compensation Act until Dec. 23, 1912, it was held that the relations existing between the parties when the injuries were received were not affected by the act.[32] The statutes vary from one another so much in regard to election and notice of election that the governing statute should be considered in each particular case, and it does not seem profitable here to review the cases further or do more than refer to certain annotations where many additional authorities are cited and reviewed.[33]

§ 2027. Territory covered by the act—Extra territorial effect.—Where the statute expressly so provides it covers injuries occurring outside of the state as well as within. But where there is no such provision some of the courts hold that the statute does not include injuries received outside of the state.[34] Some other courts, however, have taken a different view, and, at least where the statute is elective and not compulsory, the weight of authority, in accordance with what seems to be the better rule, is that, when unlimited, it includes injuries arising outside of the state.[35]

[31] Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465, Ann. Cas. 1915D, 1091n.

[32] Shevchenko v. Detroit Ry., 189 Mich. 421, 155 N. W. 423.

[33] See elaborate note in Ann. Cas. 1918B, 715, and notes in L. R. A. 1916A, 219 and L. R. A. 1917D, 90; also the following more recent cases: Reynolds v. Chicago City Ry. Co., 287 Ill. 124, 122 N. E. 371; A. T. Willett Co. v. Industrial Commission, 287 Ill. 487, 122 N. E. 864; Batson &c. Co. v. Faulk (Tex. Civ. App.), 209 S. W. 837.

[34] In re Gould, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372n; Keyes Davis Co. v. Allerdyce, Mich. Industrial Acc. Bd., April, 1913; Hicks v. Maxton (1907), 1 W. C. C. 150; Schwartz v. India Rubber &c. Co. (1912), 2 K. B. 299, 5 B. W. C. C. 390; Tomalin v. Pearson (1909), 2 K. B. 61. This is held to be the rule where the statute is compulsory even though it might be otherwise if elective. North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93; Kruse v. Pillsbury, 174 Cal. 222, 162 Pac. 891, L. R. A. 1917E, 645.

[35] Industrial Com. v. Aetna L. Ins. Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336; Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436n; Hagenbeck v. Leffert (Ind.), 117 N. E. 531; State v. Dist. Ct.,

§ 2028. Residence of beneficiary as affecting right to compensation.—It is necessary to consider the purpose and language of each particular act to determine the legislative intent as to whether it was meant that non-residents should receive the compensation provided for by the acts, as the decision must frequently turn on a construction of the statute. But where the language is general and no exception is made in this respect we think that non-resident and alien beneficiaries are included.[36] Alien beneficiaries have generally been held entitled to recover under statutes similar to Lord Campbell's Act,[37] and under the Federal Employers' Liability Act.[38]

139 Minn. 205, 166 N. W. 185, 3 A. L. R. 1347; Rounsaville v. Central R. Co., 87 N. J. L. 371, 94 Atl. 392; Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158; Grinnell v. Wilkinson, 39 R. I. 447, 98 Atl. 103, Ann. Cas. 1918B, 618; Gooding v. Ott, 77 W. Va. 487, 87 S. E. 862, L. R. A. 1916D, 637. See also Pierce v. Bekins Van &c. Co., 185 Ia. 1346, 172 N. W. 191; Bon Jellico Coal Co. v. Wilson, 167 Ky. 590, 181 S. W. 169; Doeny v. Wright &c. Lighterage Co., 36 N. J. L. J. 121; Albanese v. Stewart, 2 Bradburys Pl. & Pr. Rep. 189; Schweitzer v. Hamburg Air Line, 78 Misc. 448, 138 N. Y. S. 944; 3 Bradbury's Pl. & Pr. Rep. 285; Pensabene v. Auditive Co., 2 Bradbury's Pl. & Pr. Rep. 197, and note in 3 A. L. R. 1351-1365. Where an injury occurred in Massachusetts to a citizen of Rhode Island who was employed in the former state by a corporation which had taken the benefit of the Massachusett's statute the Supreme Court of Rhode Island, where the suit was brought, said: "Where an accident occurred in a foreign jurisdiction, under whose law plaintiff waived his right to bring a common law action to recover by failing to give notice in writing to his employer at the time of the hiring that he claimed his right to bring such action, he can not bring in this state an action at common law for the injury." Pendar v. H. & B. Am. Mach. Co., 35 R. I. 321, 87 Atl. 1, L. R. A. 1916A, 428. But compare Reynolds v. Day, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A, 432; West Jersey Trac. Co. v. Philadelphia &c. R. Co., 88 N. J. L. 102, 95 Atl. 753.

[36] Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Krzus v. Crow's Nest Pass Coal Co. (1912), A. C. 590; Varesick v. British Columbia Copper Co., 12 British Columbia 286. But see contra Krzus v. Crows Nest Pass Coal Co., 16 British Columbia 120. The New Jersey statute excludes non-resident. Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 Atl. 354; De Biasi v. Normandy Water Co., 228 Fed. 234.

[37] Post § 2054.

[38] McGovern v. Phila. &c. R. Co., 235 U. S. 389, 35 Sup. Ct. 127, 59 L. ed. 283.

§ 2029. Serious and wilful misconduct.—Many of the acts deny benefits where the injury is due to the "serious and wilful misconduct" of the workmen. It is said that the word "serious" applies to the misconduct itself rather than to the actual consequences, and that "wilful" imports that the conduct was not merely negligent or thoughtless on the spur of the moment.[39] But intentional disobedience of specific and well understood orders is usually such misconduct,[40] and intoxication causing the injury may also amount to serious and wilful misconduct.[41] Whether the violation of a rule of the employer amounts to such misconduct may depend upon both the nature of the rule and the conduct itself, and also on other circumstances, as for instance, whether, on the one hand, there is an emergency or good excuse, or, on the other, deliberate and intentional violation of the rule.[42] The burden of showing wilful and serious

[39] Johnson v. Marshall Sons & Co. (1906), 94 L. T. 828, 8 W. C. C. 10. See also Rees v. Powell &c. Coal Co. (1900), 4 W. C. C. 17; Messick v. McEntire, 97 Kans. 813, 156 Pac. 740; Burris Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787n; Gignac v. Studebaker Corp., 186 Mich. 574, 152 N. W. 1037; Archibald v. Ott, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D, 1013.

[40] Brooker v. Warren (1907), 23 T. L. R. 201, 9 W. C. C. 26; Jones v. London &c. Ry. Co. (1901), 3 W. C. C. 46; Watson v. Butterly Co. (1902), 5 W. C. C. 51; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35. See also Northern Ind. Gas &c. Co. v. Pietzvak (Ind. App.), 118 N. E. 132; Kent v. Boyne City Chemical Co., 195 Mich. 671, 162 N. W. 268; Jette v. Grand Trunk Ry. Co., Rep. Jud. Quebec, 40 C. S. 204. And may be such as to preclude compensation because it removes him from the course of his employment or the like. See Williamson v. Berlin Mills Co., 190 Fed. 1; Parker v. Hambrook (1912), 5 B. W. C. C. 608; Powell v. Bryndu Colliery Co. (1911), 5 B. W. C. C. 124; Revie v. Cumming (1911), 5 B. W. C. C. 483. But failure to obey a rule or order is not necessarily wilful misconduct in all cases. See Peru Basket Co. v. Kuntz (Ind. App.), 122 N. E. 349; Baltimore Car &c. Co. v. Riezicka, 132 Md. 491, 104 Atl. 167, 4 A. L. R. 113, and note on p. 116 et seq.; Wick v. Gunn (Okla.), 169 Pac. 1087, 4 A. L. R. 107.

[41] Bradley v. Salt Union (1906), 122 L. T. J. 302, 9 W. C. C. 31; Burrell v. Avis (1898), 1 W. C. C. 129; Lee v. Fidelity &c. Co., Mass. Indus. Acc. Bd., cited in Bradbury's Workmen's Compensation Law (Ind. ed.) 488. See also Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.

[42] See Bist v. London &c. Ry. Co. (1907), 96 L. T. 750, 9 W. C. C. 19; Jones v. London &c. Ry. Co. (1901), 3 W. C. C. 46; George v. Glasgow Coal Co. (1908), 99 L. T.

misconduct of the employe as a defense is, at least in most jurisdictions, upon the employer.[42a]

§ 2030. Disobedience of rules or regulations of master.—A master has the right to adopt and promulgate reasonable rules and regulations for the conduct of his business and the safety of his servants, and a violation by a servant of such a rule of which he has knowledge is such negligence as will preclude a recovery for personal injuries to which such disobedience is a contributory cause.[43] The principle upon which the general rule is based is said to be that it may be assumed that the master has prescribed such methods of doing the work as experience has shown to be the safest for the servant, and therefore it is immaterial whether the servant fully appreciated the danger of acting in disobedience of his master's rules and regulations.[44] If, however, the regulation violated is one adopted,

782, 2 B. W. C. C. 125 (held a question of fact); Johnson v. Marshall, Sons & Co. (1906), 94 L. T. 828, 8 W. C. C. 10; Nickerson's Case, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790n.

[42a] Northern Ind. Gas Co. v. Pietzvak (Ind. App.), 118 N. E. 132; Haskell &c. Car Co. v. Key (Ind. App.), 119 N. E. 811; Freeman v. East Jordan &c. R. Co., 191 Mich. 529, 118 N. W. 204; note in 4 A. L. R. 127.

[43] Bist v. London, etc., R. Co. (1907), A. C. 209, 8 Ann. Cas. 1; Harris v. London St. R. Co., 39 Can. Sup. Ct. 398, 10 Ann. Cas. 151. See also Woodward Iron Co. v. Lewis, 171 Ala. 233, 54 So. 566; Darling v. Burnett, 96 Ark. 461, 132 S. W. 212 (rule prohibiting employe of sawmill from going behind line shaft and holding down belt); Asplund v. Conklin Constr. Co., 154 Ill. App. 164 (rule requiring linemen to use safety belt when at work on poles); Zoilesny v. University Club, 155 Ill. App. 633 (rule prohibiting servant from riding on elevator); Atoka Coal, etc., Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555; Sanders v. Natalbany Lumber Co., 124 La. 37, 49 So. 942; Lapsley v. United Electric Co., 79 N. J. L. 131, 74 Atl. 283; Memphis Consolidated Gas, etc., Co. v. Simpson (Tenn.), 109 S. W. 1155 (rule requiring telephone linemen to inspect wires to avoid escaping currents of electricity). In Meigel v. E. V. Crandall Oil, etc., Mfg. Co., 141 App. Div. 828, 126 N. Y. S. 720, the court said: "To say that a man can knowingly disregard a rule adopted for his safety, and charge the master for an injury growing directly out of the violation of that rule, is to hold a degree of liability which no adjudicated case has ever asserted, so far as we can discover; it would certainly violate every normal conception of justice." See also Mills v. Atlantic Coast Line R. Co., 85 S. Car. 463, 67 S. E. 525.

[44] Darling v. Burnett, 96 Ark. 461, 132 S. W. 212.

not for the safety of the servant, but merely for the better utilization of his services, his violation thereof will not of itself necessarily preclude his recovery.[45] By the term "rule" or "regulation" of the master, the violation of which renders the servant guilty of negligence, is meant not merely the general course of practice by which the work is usually done, but an explicit promulgated regulation or mandatory instruction.[46] In case of an emergency the servant may be justified in disobeying a rule of the master without forfeiting his right to recover for an injury received during such obedience.[47] In order to protect the life and property of the public as well as for the protection of employees it is highly important that railroad employees should observe the rules and regulations of the railroad company, and the courts in the recent cases unhesitatingly deny to an employe the right to recover for personal injuries to which his disobedience of a reasonable rule or regulation of the company has proximately contributed.[48] Such, in outline, is the law upon the subject in ordinary cases and a few of those cited arose under workmen's compensation acts. But, as shown in the last preceding section, mere negligence is not necessarily serious and wilful misconduct, and under many of the statutes at least, the effect of disobeying a rule, where the disobedience is not intentional or serious and wilful may not be such as to defeat the right to compensation under the statute even though it would defeat an action at law. Much, as already intimated, depends upon the nature of the rule and the circumstances of the particular case as well as the provisions of the act under which compensation is sought.

[45] Cavanaugh v. Windsor Cut Stone Corp., 80 Conn. 585, 69 Atl. 345; Horandt v. Rosenthal, 81 N. J. L. 474, 79 Atl. 321.

[46] Schaufile v. Central of Georgia R. Co., 6 Ga. App. 660, 65 S. E. 708; Atlantic Coast Line R. Co. v. McLeod, 9 Ga. 13, 70 S. E. 214.

[47] Brown v. Southern R. Co., 82 S. Car. 528, 64 S. E. 522 (going between cars to make coupling).

[48] Warren v. Erie R. Co., 166 Fed. 423; Great Northern R. Co. v. Hooker, 170 Fed. 154; Chicago, etc., R. Co. v. Ship, 174 Fed. 353; Louisville, etc., R. Co. v. Woodward, 176 Fed. 5; Atlantic Coast Line R. Co. v. McLeod, 9 Ga. App. 13, 70 S. E. 214; Illinois Cent. R. Co. v. Braden, 128 Ill. App. 265; Wetzel v. Baltimore &c. R. Co., 147 Ill. App. 195; Cleveland, etc.,

§ 2031. Accidents arising out of and in course of employment.—The question the English courts have most frequently been called on to determine is whether the accident in a particular case arose out of and in the course of the workmen's employment within the meaning of the statute. Since under all the workmen's compensation acts the accident must bear a close relation to the workmen's employment the decisions under the English act on the question indicated will be helpful in construing similar provisions in other compensation acts. The rule laid down by the English cases is that an applicant for relief under a workmen's compensation act must give evidence, or sustain the burden of showing that the accident arose out of as well as in the course of the employment.[49] Most of the American statutes, like the English Act, require that the accident should arise out of as well as occur in the course of the employment, and this clearly means something more than the mere occurrence of an accident during the course of the employment. Where the award is made to depend on accident arising out of the employment as well as in its course there must be a concurrence of all these elements.[50] It has been held

R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723; Bowers v. Atchison, etc., R. Co., 82 Kans. 95, 107 Pac. 777; Sinclair v. Illinois Cent. R. Co., 129 Ky. 828, 112 S. W. 910, 130 Am. St. 499; Louisville, etc., R. Co. v. Murphy, 143 Ky. 31, 135 S. W. 422; Foley v. Boston, etc., R. Co., 198 Mass. 532, 84 N. E. 846; Matthews v. Chicago, etc. R. Co., 227 Mo. 241, 126 S. W. 1005; O'Neill v. Lehigh Valley R. Co., 75 N. J. L. 422, 67 Atl. 1019; Houston &c. R. Co. v. Ravanelli (Tex.), 133 S. W. 424; Collins v. Mineral Point &c. R. Co., 136 Wis. 421, 117 N. W. 1014.

[49] Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458; Muzik v. Erie R. Co., 85 N. J. L. 129, 89 Atl. 248; Hewitt v. Stanley, L. T. N. S. 384 (1913), W. C. & Ins. Rep. 495; Re Eddles, etc., School Board, 22 Manitoba 240, 2 Dominion L. Rep. 696, West L. Rep. 214; Stapleton v. Dinnington Main Coal Co., 107 L. T. N. S. 247 (1912), W. C. Rep. 376; Fleet v. Johnson (1913), W. C. & Ins. Rep. 149, 57 Sol. J. 226, 29 Times L. Rep. 207; Sendrum v. Ayr Steam Shipping Co. (1913), Sc. Ct. Sess. 331 (1913), W. C. & Ins. Rep. 10; Martin v. Manchester, 106 L. T. N. S. 741, 76 J. P. 259, 10 Local Gov. Rep. 996, 29 Times L. Rep. 344 (1912), W. C. Rep. 289; Howe v. Fernhill Collieries, 107 L. T. N. S. 508 (1912), W. C. Rep. 408, note in Ann. Cas. 1918B, 770. See also Payne v. Industrial Com. (Ill.), 129 N. E. 122.

[50] Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458. See also Eugene

that a foreman who voluntarily engaged in a fight on the premises of the employer and received an injury to an eye was not entitled to compensation, as his injury was not received in the course of the employment.[51] But the courts have been very liberal in applying this rule and have held an employe entitled to compensation even when on the master's premises eating his lunch or obeying a call of nature as well as when going to or from work and the like.[52] An employe was held to be on duty though at the time of his injury he was sleeping in a bunk car, but was subject to call.[53] And one court has recently held that a driver of an ice wagon whose duties required him to work in all kinds of weather was within the statute and that compensation was properly awarded for his death by lightning while delivering ice or soliciting orders during a severe storm.[54] As

Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764 and note; Savage's Case, 222 Mass. 205, 110 N. E. 283; Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310, and other cases cited in last preceding note. But see under Washington statute, Stertz v. Industrial Ins. Com., 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 355.

[51] Clark v. Clark, 189 Mich. 652, 155 N. W. 507. See also Hulley v. Moosbrugger, 88 N. J. L. 161, 95 Atl. 1007, L. R. A. 1916C, 1203; De Voe v. New York State Rys., 155 N. Y. S. 12. But compare Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, Ann. Cas. 1918B, 588n.

[52] Rowland v. Wright, 24 T. L. R. 852; Blovelt v. Sawyer (1904), 1 K. B. 271; Brice v. Lloyd (1909), 2 K. B. 804; Thomson v. Flemington Coal Co., 48 Scotch L. R. 740; McKee v. Great Northern R. Co., 42 Ir. L. T. 132; Chelty v. Nelson, 126 L. T. J. 172; Smith v. South Normanton Colliery Co., 88 L. T. 5; Riley v. Holland, 104 L. T. 371. See also Rainford v. Chicago City Ry. Co., 289 Ill. 427, 124 N. E. 643 (injury to street car conductor while ordering lunch arises out of and in course of employment); In re Employers' Liability Assur. Co., 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306n, Ann. Cas. 1914D, 621n. But not ordinarily where his employment has ceased and terminated at quitting time or has not begun. Guastelo v. Michigan Cent. R. Co., 194 Mich. 382, 160 N. W. 484, L. R. A. 331; Kowalek v. New York Consol. R. Co., 229 N. Y. 489, 128 N. E. 888.

[53] St. L. A. & T. R. Co. v. Welch, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839. See also Papinaw v. Grand Trunk Ry. Co. of Canada, 189 Mich. 441, 155 N. W. 575. See further Cline v. Studebaker Corporation, et. al., 189 Mich. 514, 155 N. W. 519, L. R. A. 1916C, 1139.

[54] State ex rel Peoples Coal &c. Ice Co. v. Dist. Ct. (Minn.), 153

a general rule an accident which is the result of a risk reasonably incidental to the employment is an accident arising out of the employment within the meaning of the statute.[55] But the words "arising out of and in the course of the employment" do not make the employer an insurer against all risks but include only those injuries arising from the risks of the employment which are suffered while the employe is acting within the scope of the employment.[56]

§ 2032. Who are "workmen"—Casual employes.—In the American compensation acts the word "employes" is generally used instead of the word "workman," which is used in the

N. W. 119. For other recent cases holding the injury to have arisen out of as well as in the course of the employment see Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999; In re Reithel, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304; Papinaw v. Grand Trunk R. Co., 189 Mich. 441, 155 N. W. 545; Muzik v. Erie R. Co., 86 N. J. L. 695, 92 Atl. 1087, and notes in Ann. Cas. 1916B, 1293, and L. R. A. 1917D, 114. See also as to "accidents," such as sunstroke and the like, Morgan v. Zenaida (1909), 25 T. L. R. 446; Ismay v. Williamson (1908), 42 Ir. L. T. 213. But compare Dozier v. Fidelity &c. Co., 46 Fed. 446, 13 L. R. A. 114; Warner v. Couchman (1911), 1 K. B. 351; Fitzgerald v. Clark (1908), 99 L. T. 101. See as to aggravation of disease and what is disease and what accidental injury, Great Western &c. Co. v. Pillsbury, 171 Cal. 69, 151 Pac. 1136; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640; notes in L. R. A. 1916A, 273 and Ann. Cas. 1918B, 293 and 362; Noden v. Galloway (1911), 5 B. W. C. C. 7; Thoburn v. Bedlington Coal Co. (1911), 5 B. W. C. C. 128; Beaumont & Underground Elec. Ry. Co. (1912), 5 B. W. C. C. 247; Willoughby v. Great Western Rys. Co. (1904), 6 W. C. C. 28; Dean v. London &c. Ry. Co. (1910), 3 B. W. C. C. 351; Timmons v. Leeds Forge Co., 16 L. T. R. 521; Chandler v. Great Western Ry. Co. (1912), 5 B. W. C. C. 254; Wilkes v. Dowell & Co. (1905), 2 K. B. 225, 7 W. C. C. 14.

[55] Pierce v. Boyer &c. Lumber &c. Co., 99 Nebr. 321, 156 N. W. 509, L. R. A. 1916D, 970; Scott v. Payne, 85 N. J. L. 446, 89 Atl. 927; Milwaukee Coke &c. Co. v. Industrial Com., 160 Wis. 247, 151 N. W. 245.

[56] Mann v. Glastonbury Knitting Co., 90 Conn. 116, 96 Atl. 368. The subject of this section is elaborately considered in the notes in Ann. Cas. 1916B, 1293, L. R. A. 1916A, 227, 232, and L. R. A. 1917D, 103, 114, et seq., where many illustrative cases as to what are and what are not accidents arising out of the course of employment are reviewed.

English acts.[57] Officers of a corporation may be employes within the acts.[58] But independent contractors and their employes are not employes of one by whom the contractor is employed and are not within the usual compensation acts.[59] Misrepresentations made by one at the time of securing employment do not prevent him from being an employe and recovering compensation where there is no causal connection and such misrepresentations in no way contribute to his injury or

[57] Among the English and Scotch cases defining the term "workman" and determining who are included are the following: Evans v. Pemoyllt Dinas Silica Brick Co., 18 Times L. Rep. 58, 4 W. C. C. 101; Paterson v. Lockhart, Sc. Ct. Sess. 7 F. 954, 42 Scot. L. Rep. 755; M'Cready v. Dunlop, Sc. Ct. Sess. 2 F. 1027, 37 Scot. L. Rep. 779; Simmons v. Faulds, 17 Times L. Rep. 352, 65 J. P. 371, 3 W. C. C. 169; Vamplew v. Parkgate Iron, etc., Co. (1903), 1 K. B. 351, 72 L. J. K. B. 575, 88 L. T. M. S. 756, 19 Times L. Rep. 421, 67 J. P. 417, 51 W. R. 691, 5 W. C. C. 114; Simpson v. Ebbw. Bale Steel, etc., Co. (1905), 1 K. B. 453, 74 L. J. K. B. 347, 92 L. T. N. S. 282, 21 Times L. Rep. 209, 53 W. R. 390, 7 W. C. C. 101; Bagnall v. Levinstein (1907), 1 K. B. 531, 76 L. J. K. B. 234, 96 L. T. N. S. 184, 23 Times L. Rep. 165, 51 Sol. J. 145, 9 W. C. C. 100. See also Hewitt v. Hudson Bay Co., 20 Manitoba 126, 15 West L. Rep. 372; Hayden v. Dick, Sc. Ct. Sess. 5 F. 150, 40 Scot. L. Rep 95; Ellis v. Ellis (1905), 1 K. B. 324, 74 L. J. K. B. 229, 92 L. T. N. S. 718, 21 Times L. Rep. 182, 53 W. R. 311, 7 W. C. C. 97. As to what is not employment on or about a railway company, see Milner v. Great Northern R. Co. (1900), 82 L. T. 187, 2 W. C. C. 51; Pearce v. London &c. Ry. (1900), 82 L. T. 487, 2 W. C. C. 47. And as to who are casual employes not within the Act see generally Hubbe v. Lynch, 36 N. J. L. J. 87; Johnston v. Monasterevan &c. Co. (1908), 42 Ir. L. T. 268, 2 B. W. C. C. 183; Blyth v. Sewell (1909), 2 B. W. C. C. 476.

[58] Beckman v. J. W. Oelerich & Son, 174 App. Div. 353, 160 N. Y. S. 791; Bowne v. S. W. Bowne Co., 176 App. Div. 131, 162 N. Y. S. 244. So may a superintendent. Deyo v. Arizona Grading &c. Co., 18 Ariz. 149, 157 Pac. 371, L. R. A. 1916E, 1257.

[59] Donlon v. Industrial Board, 173 Cal. 250, 159 Pac. 715; Tuttle v. Embury &c. Lumber Co., 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664; Reinwald v. Builders &c. Co., 168 App. Div. 425, 153 N. Y. S. 598; Powley v. Vivian & Co., 169 App. Div. 170, 154 N. Y. S. 426. See also Kennedy v. David Kaufman &c. Co. (N. J. L.) . 91 Atl. 99. But compare Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318n. And see under later California statute Flickenger v. Industrial &c. Com., 181 Cal. 425, 184 Pac. 851. Under the Massachusetts Act a general contractor is liable for injuries to a servant of a sub-contractor. White v. George A. Fuller Co., 226 Mass. 1, 114 N. E. 829.

death for which compensation is sought.[60] But a workman is not in the employ of a railroad company so as to entitle his dependents to compensation where he had been engaged to go to work at some future time and was killed as he had alighted from a train of the defendant and was walking to a bunk house where he was to live during his employment.[61] Under some of the statutes one whose employment is only "casual" can not recover compensation thereunder,[62] but under others it is immaterial that the employment is casual provided it is for the purpose or in the usual course of the employer's trade or business,[63] and under some statutes no express reference is made to casual employment. An employment for no fixed time and no fixed work, but only as the employer might want odd jobs to be done is ordinarily a casual employment.[64] But employment for an indefinite time at so much a day or the like is not

See also Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976. And see where one was held to be an employe and not an independent contractor. State ex rel. Virginia &c. R. Co. v. District Court, 128 Minn. 43, 150 N. W. 211. Where a section hand was sent by his foreman to assist a farmer to extinguish a fire was held not to be an employe of the railroad company while so engaged in any such sense as to make the company liable for injuries to the section hand while so engaged. London Guarantee & Acc. Co. v. Industrial &c. Com., 173 Cal. 642, 161 Pac. 2. See generally as to when one is regarded as an independent contractor and when an employe under the statutes, the following recent cases: Kinsman v. Hartford Courant Co., 94 Conn. 156, 108 Atl. 562; Cinofsky v. Industrial Com., 290 Ill. 521, 125 N. E. 286; Eckert's Case, 233 Mass. 577, 124 N. E. 421.

[60] Havey v. Erie R. Co., 87 N. J. L. 444, 95 Atl. 124; Kenny v. Union R. Co., 166 App. Div. 497, 152 N. Y. S. 117.

[61] Bloomington &c. R. Co. v. Industrial Board, 276 Ill. 239, 114 N. E. 517.

[62] Gaynor's Case, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; Dyer v. James Black Masonry &c. Co., 192 Mich. 400, 158 N. W. 959, Ann. Cas. 1918C, 664. See also Blood v. Industrial Acc. Com., 30 Cal. App. 274, 157 Pac. 1140.

[63] State ex rel. Northfield v. District Court, 131 Minn. 352, 155 N. W. 103, Ann. Cas. 1917D, 866n. Such also is the rule under the English statute.

[64] Cheever Case, 219 Mass. 244, 106 N. E. 861; Hill v. Begg (1908), 2 K. B. 802, 77 L. J. K. B. N. S. 1074. And where one assists in doing other work incidentally and not part of his regular employment such other work is generally casual. McCarty v. Norcott (1908), 43 Ir. Law Times 17; Knight v.

necessarily casual.[65] The question as to whether the general or the special employer must make compensation in any particular case depends largely upon the governing statute and the facts of the case. In Massachusetts it is held that an employe lent to a special employer, and assenting thereto, becomes the servant of the employer to whom he is lent and must look to him for compensation when injured in such special employment and not to his general employer.[65a]

§ 2033. Who is "dependent" within the act.—Most of the American compensation acts define or describe the term "dependent" with more particularity than does the English act. The question as to how far a member of the family of a deceased workman was dependent on his earnings within the meaning of the English act is a question of fact to be determined on a consideration of all the circumstances of the case.[66] The mere fact that the deceased was legally bound to support a certain person does not of itself raise a presumption of law that such person was dependent, in the absence of some stat-

Bucknell (1913), W. C. & Ins. Rep. (Eng.) 175, 6 B. W. C. C. 160. See also La Grande Laundry Co. v. Pillsbury, 173 Cal. 777, 161 Pac. 988.

[65] Scott v. Payne Bros., 85 N. J. L. 446, 89 Atl. 927; Sabella v. Braziliers, 86 N. J. L. 505, 91 Atl. 1032, affirmed in 94 Atl. 1103. See also Smith v. Button (1915), 84 L. J. K. B. N. S. 697, 112 L. T. N. S. 893, 8 B. W. C. C. 196; Tombs v. Bomford (1912), 106 L. T. N. S. 823, 5 B. W. C. C. 338; Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506; Dyer v. James Black Masonry &c. Co., 192 Mich. 400, 158 N. W. 959, Ann. Cas. 1918C, 664.

[65a] Scribner v. Framingham Ice Co., 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178. But there is some difference of opinion upon various phases of the general subject. The authorities are reviewed in the note in 3 A. L. R. 1178, et seq.

[66] Simmons v. White (1899), 1 Q. B. 1007, 80 L. T. N. S. 344, 1 W. C. C. 89, 68 L. J. Q. B. 507, 47 W. R. 513, 15 Times L. Rep. 263; Main Colliery Co. v. Davis (1900), A. C. 358, 69 L. J. Q. B. 755, 83 L. T. N. S. 83, 16 Times L. Rep. 460, 65 J. P. 20, 2 W. C. C. 108; Hodgson v. Owners of West Stanley Colliery (1910), A. C. 229, 102 L. T. N. S. 194, 3 B. W. C. C. 260, 79 L. J. K. B. 356, 26 Times L. Rep. 353, 54 Sol. J. 403, 47 Scot. L. Rep. 881; New Moncton Collieries v. Keeling (1911), A. C. 648 (1911), W. N. 176, 80 L. J. K. B. 1205, 105 L. T. N. S. 337, 27 Times L. Rep. 551, 55 Sol. J. 687, 4 B. W. C. C. 332; Tam-

utory provision to that effect;[67] but, as said in one of the English cases: "It by no means follows, however, that though there is no presumption of law that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her, this legal obligation is to be ignored in deciding on the fact of her dependency. On the contrary, the existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part. It is one of the many elements to be taken into account."[68] Dependency does not mean absolute and entire dependency for the actual necessities of life, and the fact that the claimant has some property or assistance from others does not necessarily take him or her out of the class of dependents.[69] It has been

worth Colliery Co. v. Hall (1911), A. C. 665 (1911), W. N. 147 4 B. W. C. C. 313; Bernard v. Davis, 42 Quebec Sup. Ct. 170; Dominion Quarry Co. v. Morin, 18 Rev. Leg. N. S. 7. See also Blanton v. Wheeler &c. Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747 and n; Finn v. Detroit &c. R. Co., 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C, 1142; Havey v. Erie R. Co., 88 N. J. L. 684, 96 Atl. 995.

[67] New Monckton Collieries v. Keeling (1911), A. C. 648 (1911), W. N. 176, 80 L. J. K. B. 1205, 105 L. T. N. S. 337, 27 Times L. Rep. 551, 55 Sol. J. 687, 4 B. W. C. C. 332. A widow and minor children are presumed dependent under some statutes. Coakley's Case, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867n; Taylor v. Seabrook, 87 N. J. L. 407, 94 Atl. 399. See also American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147; Muncie Foundry Co. v. Coffee (Ind.), 117 N. E. 524; Newman's Case, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145. But see where she lived apart from husband. Gallagher's Case, 219 Mass. 140, 106 N. E. 558; Nelson's Case, 217 Mass. 467, 105 N. E. 357. Sweet v. Sherwood Ice Co., 40 R. I. 203, 100 Atl. 316.

[68] New Moncton Collieries v. Keeling (1911), A. C. 648, 653, 654. See also, In re Carroll, 65 Ind. App. 146, 116 N. E. 844.

[69] Hotel Bond Co.'s Appeal, 89 Conn. 143, 93 Atl. 245; Caliendo's Case, 219 Mass. 498, 107 N. E. 370; State ex rel. Splady v. District Ct., 128 Minn. 338, 151 N. W. 123; Musik v. Erie R. Co., 85 N. J. L. 129, 89 Atl. 248; Jackson v. Erie R. Co.,

held under the New Jersey statute that actual dependency means dependence in fact and that the enumeration of certain persons after the heading "actual dependents" should not be held to place them in the relationship of actual dependents unless in fact they are such.[70] It is held in England that the question of dependency is in no way determined by the standard of living in the neighborhood or the particular class in society to which the family belongs;[71] but the condition and usual manner of living of the claimant may be taken into consideration in a proper case and in this country it is generally held sufficient to bring one within the statutes as a dependent if the contributions relied upon from the employe are reasonably necessary for the claimant's living expenses suitable to his or her class and position in life.[72] In most cases, it is said, the practical question will be whether assistance of one kind or another has been given out of the earnings of the deceased workman, but it may be that a person so situated that he might reasonably count on assistance from such earnings, and probably would need it, ought, in the circumstances, to be included among the dependents.[73] The position or condition of the de-

86 N. J. L. 550, 91 Atl. 1035; Havey v. Erie R. Co., 87 N. J. L. 444, 95 Atl. 124; Hammill v. Penna. R. Co., 87 N. J. L. 388, 94 Atl. 313.

[70] Miller v. Public Service R. Co., 84 N. J. L. 174, 85 Atl. 1030. See also Miller v. Riverside Storage & Cartage Co., 189 Mich. 360, 155 N. W. 462; Havey v. Erie R. Co., 88 N. J. L. 684, 96 Atl. 995 (holding that New Jersey statute, unlike the British, does not recognize the family as a unit, and to come within the statute the individuals named therein must be actually dependent in fact on the deceased and not on a common family fund).

[71] Main Colliery Co. v. Davis (1900), A. C. 358, 69 L. J. Q. B. 755, 16 Times L. Rep. 460, 65 J. P. 20, 2 W. C. C. 108; Howells v. Vivian, 85 L. T. N. S. 529, 18 Times L. Rep. 36, 50 W. R. 163, 4 W. C. C. 106; French v. Underwood, 19 Times L. Rep. 416, 5 W. C. C. 119.

[72] Hotel Bond Co's. Appeal, 89 Conn. 143, 93 Atl. 245; Blanton v. Wheeler &c. Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747; Dazy v. Apponang Co., 36 R. I. 81, 89 Atl. 160; Poccardi v. State Compensation Com., 79 W. Va. 684, 91 S. E. 663.

[73] Orrell Colliery Co. v. Schofield (1909), A. C. 433. So, a dependent has been defined in a number of cases as one who looks to another for support, or, in other words, one who relies on another for reasonable living expenses or necessities. In re Carroll, 65 Ind. App. 146, 116 N. E. 844; Jackson v. Erie R. Co.,

pendent at the time of the decedent's death, and not afterwards, is the controlling question. Therefore sources of income which may arise after that date cannot be taken into consideration. Thus, the amount of income that may come to a widow out of her husband's estate cannot be considered in determining her dependency.[74] As already shown, where the statute provides for compensation to actual dependents, one may be within the statute although not entirely dependent upon the deceased employe for actual necessities of life, and the courts are rather liberal in construing such statutes even where they require the claimant to be wholly dependent.[75] Many of the statutes also contain express provision for partial dependency,[76] and many provide that compensation shall be made to those of a certain specified class, or that they shall be conclusively presumed to be dependents, as, for instance, members of the employe's family or next of kin, wife or widow, children, and the like. Sometimes others are also included as actual dependents, in addition to those specified, and sometimes provision is made for apportioning the compensation in a certain way. These various provisions have been before the courts in a number of cases, but a bare reference to the principal decisions in which they have been construed and applied must suffice here.[77]

86 N. J. L. 550, 91 Atl. 1035; Terrie v. Bush Terminal Co., 172 App. Div. 386, 158 N. Y. S. 883. See also Blanton v. Wheeler &c. Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747n.

[74] Pryce v. Punrikyber Nav. Colliery Co. (1902), 1 K. B. 221, 85 L. T. N. S. 477, 4 W. C. C. 115, 18 Times L. Rep. 54, 71 L. J. K. B. 192, 66 J. P. 198, 50 W. R. 197. See also Blanton v. Wheeler &c. Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747n; Miller v. Riverside Storage &c. Co., 189 Mich. 360, 155 N. W. 462; Birmingham v. Westinghouse Elec. &c. Co., 180 App. Div. 48, 167 N. Y. S. 520, 82 Am. St. 731; Tirre v. Bush Terminal Co., 158 N. Y. S. 883, 172 App. Div. 386. But compare Parson v. Murphy, 101 Nebr. 542, 163 N. W. 847.

[75] See State ex. rel. Splady v. District Ct., 128 Minn. 338, 151 N. W. 123.

[76] See note in Ann. Cas. 1918B, 760.

[77] Coakley's Case, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867; Finn v. Detroit &c. R. Co., 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C, 1142; Roberts v. Whaley, 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A, 189; State ex rel. Crooks-

§ 2034. Notice of injury and claim.—It is generally provided that notice of the injury shall be given to the employer within a specified time, or "as soon as practicable," and a claim for compensation made. These are not regarded as mere formal or technical steps; and if, without reasonable excuse, there is a failure to take them, and the employer is prejudiced thereby, this will ordinarily prevent a recovery of compensation under the statute,[78] unless the owner has full knowledge or has waived them.[79] Under the English act and some of the statutes the notice of the injury or accident must be in writing,[80] but in most of the states, and England as well, the notification of a

ton Lumber Co. v. District Ct., 131 Minn. 27, 154 N. W. 509; State v. District Ct., 134 Minn. 131, 158 N. W. 798; McFarland v. Central R. Co., 84 N. J. L. 435, 87 Atl. 144; Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91 (dependent stepchildren included within the word "children"); Crockett v. International R. Co., 176 App. Div. 45, 162 N. Y. S. 357; Armstrong v. Industrial Com., 161 Wis. 530, 154 N. W. 845; Kuetach v. Industrial Com., 166 Wis. 378, 165 N. W. 302; note in Ann. Cas. 1918B, 750, et seq.

[78] Haiseldon v. Industrial Board, 275 Ill. 114, 113 N. E. 877; Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496; Bloom's Case, 222 Mass. 434, 111 N. E. 45; Re McLean, 223 Mass. 342, 111 N. E. 783; Bloomfield v. November, 219 N. Y. 374, 114 N. E. 805; Burville v. Vickers (1916), 1 K. B. 180, 85 L. J. K. B. N. S. 256, 9 B. W. C. C. 50.

[79] Halverhout v. Southwestern Mill Co., 97 Kans. 484, 155 Pac. 916; Ackerson v. National Zinc Co., 96 Kans. 781, 153 Pac. 530; State ex. rel. Crookston Lumber Co. v. District Ct., 132 Minn. 251, 156 N. W. 278. The making of the claim within the statutory time is held in Illinois to be jurisdictional and a condition precedent that is not waived by failure to raise the question before appeal. Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496. Contra Red River Lumber Co. v. Pillsbury, 174 Cal. 37, 160 Pac. 982, Ann. Cas. 1918C, 1022. To the effect that failure to give notice will not prevent recovery where the employer is not prejudiced and as to where he is not prejudiced, see Schmidt v. O. K. Baking Co., 90 Conn. 217, 96 Atl. 963; Knoll v. Salina, 98 Kans. 428, 157 Pac. 1167; Pellett v. Industrial Com., 162 Wis. 596, 156 N. W. 956, Ann. Cas. 1917D, 884; Lochgelly Iron &c. Co. v. Kirk (1916), 86 L. J. P. C. N. S. (Eng.) 61. As to what does prejudice the employer, see Burville v. Vickers (1916), 1 K. B. 180 (want of notice until too late to make proper investigation); Jones v. Arnold (1915), 9 B. W. C. C. 40; Jones v. Richard Thomas & Co. (1916), 9 B. W. C. C. 237 (want of notice in time to furnish medical aid).

[80] Griffiths v. Atkinson (1912), 106 L. T. N. S. 555, 5 B. W. C. C. 345; note in L. R. A. 1916A, 84.

claim for compensation is not required to be in writing.[81] It is not necessary that notice of the injury should be given to the employer personally.[82]

§ 2035. Medical examination and treatment.—Most if not all of the Workmen's Compensation Acts contain provisions for medical examinations of the workmen where compensation is claimed. There are a number of decisions involving the English act, however. It is not, as a matter of law, a refusal to submit to an examination for a workman to state that he has no objection to submitting to an examination provided that his physician is allowed to be present.[83] But, ordinarily at least, the employe has no right to insist on such a condition, especially if it is coupled with the further condition that his physician shall be paid by the employer.[84] And a refusal to submit to an examination except at the office of the employe's attorney is a refusal to submit to an examination within the statute.[85] Ordinarily the report of a medical referee is conclusive.[86] The injured employe must also use reasonable care and means to

[81] See Suburban Ice Co. v. Industrial Board (1916), 274 Ill. 630. 113 N. E. 979; Sillix v. Armour & Co., 99 Kans. 103, 160 Pac. 1021; Gailey v. Peet Bros. Mfg. Co., 98 Kans. 53, 157 Pac. 431.

[82] Thus, notice to a foreman or supervising employe has been held sufficient. Butt v. Gellyceidrein Colliery Co. (1909). 3 B. W. C. C. 44; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Bloom's Case, 222 Mass. 434, 111 N. E. 45. But compare Penin v. Talbott (1914). 7 B. W. C. C. 565. Notice to or knowledge of a proper agent of a corporation may be sufficient. Allen v. Millville, 87 N. J. L. 356, 95 Atl. 130, affd. in 88 N. J. L. 693, 96 Atl. 1101. As to the time within which it must be given, see Bloom's Case, 222 Mass. 434, 111 N. E. 45; Johansen v. Union Stock Yds. Co., 99 Nebr. 328, 156 N. W. 511; Pzeniczny v. Canadian Northern R. Co., 25 Manitoba L. R. 655, 25 D. L. R. 128.

[83] Divitt v. Steamship Bainbridge (1909). 2 K. B. 802. See also as to what is not a refusal, Harding v. Royal Mail Steam Packet Co., 4 B. W. C. C. 59; W. Baird & Co. v. Kane, Sc. Ct. Sess. T. F. 461; McLean's Case. 223 Mass. 342, 111 N. E. 783; Birmingham v. Lehigh &c. Coal Co. (N. J.), 95 Atl. 242.

[84] Morgan v. Dixon (1912), A. C. 74; Osborn v. Vickers (1900), 2 Q. B. 91.

[85] Warby v. Plaistowe & Co., 43 W. C. C. 67.

[86] Cruden v. Menoyss Coal Co. (1913), Sc. Ct. Sess. 534 (1913), W. C. & I. Rep. 188; M'Avan v. Boase Spinning Co., Sc. Ct. Sess. 3 F. 1048; Ferrier v. Gourlay Bros. &

recover his earning capacity,[87] and refusal to submit to a minor surgical operation may be cause for denying him compensation.[88] But he is not required to take chances and submit to a serious operation, especially if it is against the advice of his own physician or of doubtful benefit.[89]

§ 2036. Compensation recoverable—Average weekly earnings.—Various provisions are made by the different statutes for determining the amount of compensation and its apportionment,[90] and some of the statutes provide for specific allowances for the loss of members of the body of the injured employe, such as a hand, a foot, or an eye, and the like.[91] Under some of the statutes an award to a wholly dependent person vests in him when it is made, and on his death his personal representative is entitled to any balance thereof remaining unpaid;[92] but under the Massachusetts statute it is held that upon the death of a dependent who was the sole next of kin of the deceased employe all obligation to pay compensation ends.[93]

Co., Sc. Ct. Sess. 4 F. 711; John Bryce & Co., Sc. Ct. Sess. 7 F. 193. But see M'Ginn v. Udston Coal Co. (1912), Sc. Ct. Sess. 668 (1912), W. C. Rep. 134; Kennedy v. Dixon (1913), Sc. Ct. Sess. 659 (1913), W. C. & I. Rep. 333; Garrett v. Waddell (1911), Sc. Ct. Sess. 1168; Winters v. Addie & Sons' Collieries (1911), Sc. Ct. Sess. 1174; Jackson v. Scotstown Estate Co. (1911), Sc. Ct. Sess. 564; Johnstone v. Cochran & Co., Sc. Ct. Sess. 6 F. 854.

[87] Dowde v. Bennie (1902), 5 Sc. Ct. Sess. Cas. 5th series, 268, 40 Scot. L. R. 219; Wright v. Sneyd Collieries (1915), 84 L. J. K. B. N. S. 1332.

[88] Donnelly v. Baird (1908), S. C. (Scot.) 536; Wanicken v. Moreland (1909), 1 K. B. 184, 78 L. J. K. B. N. S. 332; Lesh v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105.

[89] Gracie v. Clyde Spinning Co. (1915), 52 Scot. L. R. 706; Moss v. Akers (1911), 4 B. W. C. C. 294; Rothwell v. Davies (1903), 19 Times L. R. 432; Fulton v. The Majestic (1909), 2 K. B. 54, 78 L. J. K. B. N. S. 530.

[90] See notes in L. R. A. 1916A, 253 et seq.; L. R. A. 1917D, 167 et seq.

[91] See notes in L. R. A. 1917D, 167.

[92] State ex rel. Mundreig v. Industrial Com., 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162; United Collieries v. Simpson (1909), A. C. 383, 78 L. J. C. P. N. S. 129; Darlington v. Roscoe (1907), 1 K. B. 219, 76 L. J. K. B. N. S. 371. But compare Ivey v. Ivey (1912), 2 K. B. 118, 5 B. W. C. 279.

[93] Re Murphy, 224 Mass. 592, 113 N. E. 283. Compare also Matecny

Under most of the statutes the basis of compensation is the "average weekly earnings" of the injured employe who claims compensation.[94] There is little, if any, difficulty in determining the average weekly earnings of an injured employe where he has been continuously in the same employment for a year or more, especially if he is paid by the week. And the statutes or courts usually fix the average weekly earnings at one fifty-second part of his annual earnings,[95] although a different rule sometimes obtains where the employe has lost considerable time during the year.[96] A more difficult question, perhaps, in these as well as other cases, is where the employe has worked part of the time for one employer and part of the time for another or has worked for two or more employers at the same time. It seems to be pretty well settled that the earnings to be considered are not necessarily confined to those received from the one employer for whom he was working at the precise time of his injury.[97] And it is laid down as a general rule that

v. Vierling Steel Works, 187 Ill. App. 448; Woodcock v. Walker, 170 App. Div. 4, 155 N. Y. S. 702.

[94] See notes in Ann. Cas. 1918B. 640, L. R. A. 1916A, 149, 260, L. R. A. 1917D, 175.

[95] See Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437. In Kansas average annual earnings are deemed to be fifty-two times the average weekly wage. McCrackin v. Missouri Val. Bridge &c. Co., 96 Kans. 353, 150 Pac. 832, Ann. Cas. 1918B, 689n. In New Jersey compensation is based on the wages which the employe received at the time of the accident. Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 Atl. 58.

[96] Under the Massachusetts statute the average weekly earnings of an employe who has lost more than two weeks' time during the year is the amount received as wages during the year divided by the actual number of weeks during which he worked. Re Bartoni, 225 Mass. 349, 114 N. E. 663, L. R. A. 1917E, 765. See also Frankfort General Ins. Co. v Pillsbury, 173 Cal. 56, 159 Pa. 150 (average annual earnings deemed 300 times the average daily earnings).

[97] Western Metal &c. Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Lloyd v. Midland R. Co. (1914), 2 K. B. 53, 83 L. J. K. B. 330, 7 B. W. C. C. 72. See also Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371; De Mann v. Hydraulic Engineering Co., 192 Mich. 594, 159 N. W. 380. Under this rule the average weekly earnings, where there are concurrent contracts of service, are usually computed as if they were all under the employment of the master for whom the employe

earnings received as incidents of his employment are to be considered even though from others than the particular employer.[98] Thus, tips received by a railroad porter as an incident of his service as such are to be included as part of his earnings.[99] In cases of job or piece work and where the employe has worked for the employer against whom the claim is made for too short a time to fairly determine the average weekly earnings under such master there is often difficulty in determining the average earnings, and there is some difference of opinion as to how it should be done, unless, as in some instances, the governing statute specifically prescribes the rule. In such cases it has been held proper to compute his average weekly earnings on the average earnings of others in the same employment.[1] Where the wages were twenty-five cents an

was working at the time of injury. But it is held that this rule does not apply to mere casual jobs, nor, ordinarily to successive contracts with several different employers. Cue v. Port of London Authority, 3 K. B. 892, Ann. Cas. 1916C, 887; Alderman v. Warren (1916), W. C. & Ins. Rep. (Eng.) 266, 32 Times L. R. 665, 9 B. W. C. 507; Sales v. Abbott (1916), W. C. & Ins. Rep. 124, 85 L. J. K. B. N. S. 1666, 9 B. W. C. C. 333. Compensation, however, is usually based on the wages earned in the employment in which the employe was engaged at the time of the injury even though his regular trade or occupation may have been different and the employment in question of a temporary nature. West Salem v. Industrial Com., 162 Wis. 57, 155 N. W. 929. See also Dalgleish v. Edinburgh Roperies & Sailcloth Co. (1913), Sc. Ct. Sess. 1007.

[98] Helps v. Great Western R. Co. (1917), 86 L. J. K. B. 1006; Perin v. Spiers (1908), 1 K. B. 766, 770, 14 Ann. Cas. 335.

[99] Great Western R. Co. v. Helps (1918), A. C. 141, Ann. Cas. 1918B, 1120; Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. S. 904.

[1] Cox v. Trollope & Sons (1916), 2 K. B. 682, Ann. Cas. 1918B, 637. So, where the employe was working by the day at the time of injury but had previously been working only by the job, it was held proper to take the union rate of wages of the union of which he was a member. Gove v. Loyal Indemnity Co., 223 Mass. 187, 111 N. E. 702. And where the employe was paid so much a ton it was held proper to base the compensation upon his annual earnings regarded as 300 times the average daily earnings, where his work was required to be done during the whole year and the employer worked substantially every working day in the year. Decatur &c. Light Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915. In an English case it appeared that a carpenter who had been working in Canada came

hour it was held that a finding that the employe's weekly wage would be fifteen dollars a week was proper under a showing that the regular working week in the community in such em-

to England in November intending to return to Canada in April. He worked temporarily for employers whom he had informed of his intention to leave England, and having met with an accident in February, after working for nine weeks, he claimed compensation. The arbitrator assessed compensation under Schedule 1, Clause 1, (b) of the Act at fifty per cent. of the one-ninth part of the aggregate amount actually earned by the workman during the nine weeks, and refused to take into consideration that the employe might have earned more in the summer by working longer hours at the same employment, as he was intending to leave for Canada in April and he considered it not "impracticable," under Schedule 1, Clause 2 (b) at the date of the accident to compute the rate of remuneration of the workman in that way. It was held that the employment being admittedly of a temporary character, the arbitrator had made no error of law in so computing the "average weekly earnings," and was not bound to give the workman the benefit of the higher wages he might have earned when the days were longer if he had continued in the same employment. Godden v. Cowlin (1913), 1 K. B. 590, 82 L. J. K. B. 509 (1913), W. C. & I. Rep. 330, 108 L. T. (N. S.) 166, 57 Sol. J. 202, 29 Times L. Rep. 255. In another case a man engaged in "extra casual labor" met with an accident in such employment, in which he had been engaged for only a day, so that his "average weekly earnings" had to be computed by taking the average amount earned by "a person in the same grade" as himself within Schedule I (2) (a) of the Act. The man's employers had two classes of casual laborers—"B" ticket men got on the average four days' work a week, and "extra casual laborers" three days a week. Both classes received the same rate of pay and did the same work. It was held (Cozens-Hardy, M. P., dissenting) that the preference made a difference of grade between the "B" ticket men and the "extra casual laborers," and that in computing the man's average weekly earnings under Schedule I (2) (a) regard must be had to the average amount earned by the latter grade and not to that earned by the former grades. Barnett v. Port of London Authority (1913), 2 K. B. 115, 82 L. J. K. B. 353 (1913), W. C. & I. Rep. 250, 108 L. T. (N. S.) 277, 57 Sol. J. 282, 29 Times L. Rep. 252. In still another case the evidence showed that a workman was taken on during a dock strike as an extra dock laborer and was incapacitated, after working for twelve days, by an accident arising out of and in the course of his employment. He was paid at the ordinary rate per hour of a casual dock laborer, but was able to earn more than an extra casual dock

ployment was six days of ten hours each.[2] The general scheme of the statutes is for periodical payments in case of disability or incapacity, usually weekly, but in some instances payments in lump sums have been upheld.[3]

§ 2037. Remedy and procedure.—As a general rule the compensation acts are exclusive in all cases in which they are applicable and no other remedy than that provided by them can be pursued.[4] But the right to proceed under existing laws is preserved in many of the statutes where the employe is injured by the negligence of the master, and it is generally held under most of the statutes that where the injury was caused by the negligence of a third person and not by the master the employe may bring an action against such third person for damages or proceed against the employer for compensation, and the employer in such case may usually recover from the tort feasor what such employer has thus been com-

laborer would in ordinary times because there was a shortage of workmen and the employment was continuous. The arbitrator found that the circumstances were entirely abnormal, that there was no grade to which he could find, that the workman belonged, and that the workman would have earned during the strike period at least as much per week as he earned during the first week. He therefore computed the man's average weekly earnings at that amount and awarded compensation on that basis. Priestly v. Port of London Authority (1913), 2 K. B. 115, 82 L. J. K. B. 353 (1913), W. C. & I. Rep. 250, 108 L. T. N. S. 277, 57 Sol. J. 282, 29 Times L. Rep. 252.

[2] Schaeffer v. De Grottola, 85 N. J. L. 444, 89 Atl. 921.

[3] See notes in L. R. A. 1916A, 172, 262, and L. R. A. 1917D, 178, 179.

[4] Mitchell v. Louisville &c. R. Co., 194 Ill. App. 77; McRoberts v. National Zinc Co., 93 Kans. 364, 144 Pac. 247; King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170n; Barry v. Bay State St. R. Co., 222 Mass. 366, 110 N. E. 1031; Connors v. Semet-Solvoy Co., 94 Misc. 405, 159 N. Y. S. 431; Middleton v. Texas Power &c. Co., 108 Tex. 96, 185 S. W. 556, Ross v. Erickson Constr. Co., 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F, 319. But if the act does not apply, as for instance, where it is optional and has been rejected, or for some other reason the employe does not come within its provisions he must resort to the common law remedy or some other existing statutory remedy. Smith v. Western &c. Portland Cement Co., 94 Kans. 501, 146 Pac. 1026; Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. S. 423; Puget Sound

pelled to pay.[5] So, under some of the acts alternative remedies are provided for and recovery may be had in a proper case where an action for damages had been brought and failed because there was no such cause of action.[6] The petition or application for compensation is not required to be as formal and precise as is ordinarily necessary in actions at law;[7] the practice generally is more like the equity practice than the technical common law practice, and is in many respects simpler and more flexible than either.[8] It depends so much on the local compensation act and the provisions of the various acts differ so much in this regard that no attempt will be made to treat them here.[9]

§ 2038. Appeal and review.—Provision is usually made for re-opening or review of an award in a proper case by the com-

Trac. &c. Co. v. Schleif, 220 Fed. 48. See also Helme v. Great Western Milling Co. (Cal. App.), 185 Pac. 510; Nadeau v. Caribou Water &c. Co., 118 Maine 325, 108 Atl. 190.

[5] Jacowiez v. Delaware &c. R. Co., 87 N. J. L. 273, 92 Atl. 946. Ann. Cas. 1916B, 1222n; Smale v. Wrought Washer Mfg. Co., 160 Wis. 331, 151 N. W. 803; Meese v. Northern Pac. R. Co., 211 Fed. 254; note in L. R. A. 1916A, 225. See also Western States Gas &c. Co. v. Bayside Lumber Co. (Cal.), 187 Pac. 735. But see Maryland &c. Co. v. Cincinnati &c. Ry. Co. (Ind. App.), 124 N. E. 774; Southern Surety Co. v. Chicago &c. Ry. Co., 187 Iowa 357, 174 N. W. 329; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154.

[6] See note in L. R. A. 1916A, 72, 81; San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321, 149 Pac. 586. Compare also Colorado v. Johnson Iron Works, 146 La. 68, 83 So. 381.

[7] Mercer v. Olt, 78 W. Va. 629, 89 S. E. 952.

[8] Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Hunnewell's Case, 220 Mass. 351, 107 N. E. 934. The rules of evidence are not usually so strict. Re Von Ette, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540 (but there must be more than mere hearsay evidence to sustain award).

[9] The proceedings are generally governed by the provisions contained in the act itself and not by the code or law relating to civil actions generally. State v. Duluth &c. Drilling Co. v. District Ct., 129 Minn. 423, 152 N. W. 838. See as to declaration in Illinois, Bishop v. Chicago Rys. Co., 290 Ill. 194, 124 N. E. 837.

mission or board granting it,[10] and an appeal to a court is also provided for. But the jurisdiction of the appellate court is usually confined to a review of questions of law,[11] and the findings of fact by the commission or board or trial court are usually conclusive and will not be disturbed on appeal if there is any evidence to support them.[12] Only final orders or judgments, and not mere interlocutory orders, are subject to appeal.[13] And it is held that the Minnesota statute (and this is probably true of most of the statutes), contemplates review of questions of law only, and does not extend the review by certiorari to mere interlocutory orders not in their nature appealable.[14]

[10] Bloomington &c. R. Co. v. Industrial Board, 276 Ill. 120, 114 N. E. 511; Curtis v. Slater Constr. Co., 194 Mich. 259, 160 N. W. 659; Beckmann v. J. W. Oelrich & Son, 174 App. Div. 353, 160 N. Y. S. 791; Menominee Bay Shore Lumber Co. v. Industrial Com., 162 Wis. 344, 156 N. W. 151; Dundee P. & L. Shipping Co. v. Wilcock (1916), 9 B. W. C. 471.

[11] Armour & Co. v. Industrial Board, 273 Ill. 590, 113 N. E. 138; Dale v. Saunders Bros., 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703n.

[12] Southwestern Surety Co. v. Pillsbury, 172 Cal. 768, 158 Pac. 762; Hills v. Blair, 182 Mich. 20, 148 N. W. 243; Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Poccardi v. Public Service Com., 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299; Jackson v. Erie R. Co., 86 N. J. L. 550, 91 Atl. 1035. But it is otherwise where there is no evidence to support them, as the question as to whether there is any evidence to support them is a question of law reviewable by the court. Kenney v. Boston, 222 Mass. 401, 111 N. E. 47. See also Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771n; Jillson v. Ross, 38 R. I. 145, 94 Atl. 717.

[13] State ex rel. Klemer v. District Court, 132 Minn. 100, 155 N. W. 1057. See also Snyder v. State Liability Board, 94 Ohio St. 342, 114 N. E. 268. This, at least, is the general rule under most of the statutes. Slight mistakes in calculation will not upset award, but substantial ones will usually cause the case to be sent back for reassessment of compensation. James v. Mordey, Carner & Co. (1913), W. C. & I. Rep. 670, 109 L. T. N. S. 377; Shipp v. Frodingham Iron & Steel Company, Limited (1913), 1 K. B. 577.

[14] State of Minnesota v. Dist. Court, 139 Minn. 205, 166 N. W. 185, 3 A. L. R. 1347.

CHAPTER LXII

INJURIES RESULTING IN DEATH

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§ 2045 (1359). Introductory.—As is well known, the right of action for damages for injuries resulting in death is purely statutory. At common law no action could be maintained.[1]

[1] Insurance Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; Kahl v. Memphis &c. R. Co., 95 Ala. 337, 10 So. 661; Jackson v. Pittsburgh &c. R. Co., 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; Dwyer v. Chicago &c. R. Co., 84 Iowa 479, 51 N. W. 244, 35 Am. St. 322; Eureka v. Merrifield, 53 Kans. 794, 37 Pac. 113; Eden v. Lexington &c. R. Co., 14 B. Monr. (Ky.) 204; Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616 and note; Harshman v. Northern Pac. R. Co., 14 N. Dak. 69, 103 N. W. 412; Higgins v. Butcher, Yelverton, 89; Weems v. Mathieson, 4 Macqu. H. L. C. 215; note in 70 Am. St. 670; 6 Thomp.

It is said, however, that such a right existed under the civil law.[2] The act of the British Parliament, generally known as "Lord Campbell's Act," gave a right of action, and the provisions of that act, but much varied in form, if not in substance, have been incorporated in statutes of the American states.[3] It was held under the common law rule that, although no action could be maintained for causing death, an action would lie in a proper case for the loss of services during the period intervening between the injury and the death.[4] As the right of action is purely statutory the plaintiff who seeks to enforce it must state such facts as clearly bring his case within the statute.[5] The allegations of the complaint or declaration must

Neg. § 6978-6980. See also to same effect, Earnest v. St. Louis &c. R. Co., 87 Ark. 65, 112 S. W. 141; Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687n, Ann. Cas. 1912C, 50; Wabash R. Co. v. Hassett, 170 Ind. 370, 83 N. E. 705; Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763; Chafin v. Norfolk &c. Ry. Co., 80 W. Va. 703, 93 S. E. 822. But compare Stanly v. Bircher, 78 Mo. 245; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Sullivan v. Union Pac. R. Co., 3 Dill. (U. S.) 334. So, where plaintiff in a personal injury case dies from the injuries before judgment, the suit abates and can not be further prosecuted. Pease v. Rockford City Trac. Co., 279 Ill. 513, 117 N. E. 83. But see under certain statutes, Cincinnati &c. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, 1917C, 1165n; Johnston v. Bay State Street Ry. Co., 222 Mass. 583, 111 N. E. 391, L. R. A. 1918A, 650. In Tann v. Western Pac. R. Co., 39 Cal. App. 377, 178 Pac. 971, the injured adult brought suit but subsequently died and it was held that his right of action died with him but a new and independent cause of action at once arose in favor of heirs who were personal representatives.

[2] Hubgh v. New Orleans &c. R. Co., 6 La. Ann. 495, 54 Am. Dec. 565; Hermann v. New Orleans &c. R. Co., 11 La. Ann. 5. See Canadian &c. R. Co. v. Robinson, 14 Can. Sup. Ct. 105; Harrisburg, The, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358.

[3] See 6 Thomp. Neg. (2d ed.) § 6984, et seq.

[4] Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Covington St. Ry. Co. v. Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725; Hyatt v. Adams, 16 Mich. 180; Natchez &c. R. Co. v. Cook, 62 Miss. 38; Baker v. Bolton, 1 Campb. 493. See "Statutory Liability for Causing Death," 28 Am. Law Reg. (N. S.) 328, 585; Bradshaw v. Lancashire &c. R. Co., 10 C. P. 189, 44 L. J. (C. P.) 148.

[5] McDonald v. Pittsburgh &c. R. Co., 144 Ind. 459, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. 185; Hilli-

show that the plaintiff is entitled to maintain the action,[6] and, where it is essential to a right of recovery that there should be beneficiaries of a designated class, the fact that there are such beneficiaries must be properly averred.[7] Where the law requires the performance of acts as conditions precedent to the right of recovery performance of such conditions must, as a general rule, be averred and proved.[8]

ker v. Citizens' St. R. Co., 152 Ind. 86, 52 N. E. 607; Wabash &c. R. Co. v. Cregan, 23 Ind. App. 1, 54 N. E. 767; Bowen v. Illinois Cent. R. Co., 136 Fed. 306, 70 L. R. A. 915.

[6] Frazier v. Georgia &c. R. Co., 96 Ga. 785, 22 S. E. 936; Orgall v. Burlington &c. R. Co., 46 Nebr. 4, 64 N. W. 450; Holston v. Coal & Iron Co., 95 Tenn. 521, 32 S. W. 486. See generally Close v. McIntire, 120 Ind. 262, 22 N. E. 128; St. Louis &c. R. Co. v. Yocum, 34 Ark. 493; Louisville &c. R. Co. v. Berg, 17 Ky. L. 1105, 32 S. W. 616; Sawyer v. Perry, 88 Maine 42, 33 Atl. 660; Hicks v. New York &c. R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. 471; Deni v. Pennsylvania R. Co., 181 Pa. St. 525, 37 Atl. 558, 59 Am. St. 676. See as to pleading negligence, Northern &c. R. Co. v. Craft, 69 Fed. 124.

[7] Seresen v. Northern Pac. R. Co., 45 Fed. 407; West Chicago &c. R. Co. v. Mabie, 77 Ill. App. 176; Indianapolis &c. R. Co. v. Keely, 23 Ind. 133; Stewart v. Terre Haute &c. R. Co., 103 Ind. 44, 2 N. E. 208; Missouri Pacific R. Co. v. Barber, 44 Kans. 612, 24 Pac. 969; State v. Grand Trunk &c. R. Co., 60 Maine 145; Harvey v. Baltimore &c. R. Co., 70 Md. 319, 17 Atl. 88; Commonwealth v. Eastern R. Co., 5 Gray (Mass.) 473; Commonwealth v. Boston &c. R. Co., 121 Mass. 36; Barnum v. Chicago &c. R. Co., 30 Minn. 461, 16 N. W. 364; Warren v. Englehart, 13 Nebr. 283, 13 N. W. 401; Muhl v. Michigan Southern &c. R. Co., 10 Ohio St. 272; Conlin v. Charleston &c. R. Co., 15 Rich. L. (S. Car.) 201; Lilly v. Charlotte &c. R. Co., 32 S. Car. 142, 10 S. E. 932; East Tennessee &c. R. Co. v. Lilly, 90 Tenn. 563, 18 S. W. 243; Northern Pac. R. Co. v. Ellison, 3 Wash. 225, 28 Pac. 333; Woodman v. Chicago &c. R. Co., 23 Wis. 400. But see Southern Pac. Co. v. Wilson, 10 Ariz. 162, 85 Pac. 401; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Columbus &c. R. Co. v. Bradford, 86 Ala. 574, 6 So. 90; Kessler v. Smith, 66 N. Car. 154; Warner v. Western &c. R. Co., 94 N. Car. 250. Some of the cases hold that it is not necessary to give names of beneficiaries. Conant v. Griffin, 48 Ill. 410; Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48. See Howard v. Delaware &c. R. Co., 40 Fed. 195, 6 L. R. A. 75 and note.

[8] Allen v. Atlantic &c. R. Co., 54 Ga. 503; Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419, 427 (citing text and numerous cases). See Cuttingham v. Weeks, 54 Ga. 275. But compare Brown v. New York &c. R. Co., 136 Fed. 700. It has been held that the plain-

§ 2046 (1360). **Constitutional questions.**—The question as to whether the provision of the New York constitution forbidding a limitation upon the amount of recovery in actions for injuries resulting in death can have a retrospective operation has been before the courts of that state and the decisions are in direct conflict. In one of the cases it was held that the provision only operates prospectively,[9] but in another case it is held that it has a retroactive operation.[10] In our opinion the case last mentioned is not well decided. It may be doubted whether an enactment changing the measure of liability could, in any event, be valid as against prior contracts, rights and obligations, but, however this may be, it seems quite clear that the provision in the New York constitution must, upon principle, be held to operate prospectively. There are many analogous cases holding that such provisions cannot be given a retroactive effect.[11] Statutes giving a right of action in cases of death caused by negligence have been almost uniformly upheld,[12] and the con-

tiff is not required to prosecute a wrong-doer although the wrong which caused the injury was felonious. Lofton v. Vogles, 17 Ind. 105. See also Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473; Newell v. Cowan, 30 Miss. 492; Chick v. Southeastern &c. R. Co., 57 Ga. 357; Sawtell v. Western &c. R. Co., 61 Ga. 567; Dodson v. McCauley, 62 Ga. 130; South Carolina R. Co. v. Nix, 68 Ga. 572; Western &c. R. Co. v. Meigs, 74 Ga. 857.

[9] O'Reilly v. Utah &c. Co., 87 Hun 406, 34 N. Y. S. 358, citing New York &c. R. Co. v. Van Horn, 57 N. Y. 473.

[10] Isola v. Webber, 13 Misc. 97, 34 N. Y. S. 77; Smith v. Metropolitan &c. R. Co., 15 Misc. 158, 35 N. Y. S. 1062. The cases of Denver &c. R. Co. v. Woodward, 4 Colo. 1 and 162; Linden v. Kansas &c. R. Co., 4 Colo. 433, go far in support of O'Reilly v. Utah &c. Co., 87 Hun 406, 34 N. Y. S. 358, and are opposed to the doctrine of Isola v. Webber, 13 Misc. 97, 34 N. Y. S. 77. This is true of the case of Chicago &c. R. Co. v. Pounds, 11 Lea (Tenn.) 130. And the Isola case has been reversed by the New York Court of Appeals in 147 N. Y. 329, 41 N. E. 503.

[11] In Shreveport v. Cole, 129 U. S. 36, 5 Sup. Ct. 210, 32 L. ed. 589, the court thus stated the rule: "Constitutions as well as statutes are construed to operate prospectively, unless on the face of the instrument or enactment, the contrary intention is manifested beyond reasonable doubt." See Brennan v. Electrical &c. Co., 120 Ill. App. 461; Chicago &c. R. Co. v. Pounds, 11 Lea (Tenn.) 130; Quinn v. Chicago &c. R. Co., 141 Wis. 497, 124 N. W. 653.

[12] Clay v. Central R. &c. Co., 84 Ga. 345, 10 S. E. 967; Owensboro

tention that such enactments violate the contract contained in corporate charters denied. Some of the cases place the doctrine upon the ground that there is no creation of new duties and nothing more than the creation of a new remedy for the breach of a previously existing duty.[13] Such statutes have generally been held valid although made to apply exclusively to one class of corporations,[14] but this doctrine has been challenged in an opinion of much strength.[15] Before the recent act of Congress it was settled that such statutes do not contravene the commerce clause of the federal constitution.[16] It is held that where the constitution confers upon an administrator the right to sue he may maintain an action although no statute had been enacted conferring or regulating the right.[17]

§ 2047 (1361). **Construction of statutes.**—The authorities are not in harmony upon the question whether a statute giving a right of action for death is or is not to be strictly construed. The scale is almost in equipoise, and it is difficult to say on which side the weight of authority is.[18] It seems to us that as such statutes are in derogation of the common law they

&c. R. Co. v. Barclay, 102 Ky. 16, 43 S. W. 177, and authorities cited in following notes.

[13] Boston &c. R. Co. v. State, 32 N. H. 215; Board &c. v. Scearce, 2 Duv. (Ky.) 576; Southwestern &c. R. Co. v. Paulk, 24 Ga. 356.

[14] Schoolcroft v. Louisville &c. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579 and note, citing Missouri Pacific Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107; Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 27, 9 Sup. Ct. 207, 32 L. ed. 585; Boston &c. R. Co. v. State, 32 N. H. 215; Carroll v. Missouri &c. R. Co., 88 Mo. 239, 57 Am. Rep. 382 and note; McAunich v. Mississippi &c. R. Co., 20 Iowa 338. See Van Brunt v. Cincinnati &c. R. Co., 78 Mich. 530, 44 N. W. 321; Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406.

[15] Smith v. Louisville &c. R. Co., 75 Ala. 449. See also Chicago &c. R. Co. v. Moss, 60 Miss. 641; Wilson v. Tootle, 55 Fed. 211.

[16] Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819. But see under Federal Employers' Liability Act, Mondon v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44.

[17] Thomas v. Royster, 98 Ky. 206, 32 S. W. 613. The constitutional provision was held to be self-executing.

[18] Holding that the statute is to receive a liberal construction. Hayes v. Williams, 17 Colo. 465, 30 Pac. 352; Soule v. New York &c.

should receive a strict construction; not, indeed, a construction so strict as that given penal statutes, except in cases where punitive damages are given, but where damages not simply compensatory are given, then, it seems to us, the statute should be construed according to the canons of construction applicable to penal statutes. Where a punishment is denounced and the recovery is not confined to compensatory damages the statute is in effect penal, and not simply remedial.[19] It is held by some of the federal courts that the statute does not create a new cause of action,[20] but this, at least where the statute is modeled on Lord Campbell's Act, seems to be contrary to the doctrine of later federal decisions and of the English courts.[21] There is, as it seems to us, difficulty in maintaining the doctrine of the federal courts.

R. Co., 24 Conn. 575; Lamphear v. Buckingham, 33 Conn. 237; Merkle v. Bennington Township, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666; Bolinger v. St. Paul &c. R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. 680. See also Hunt v. Conner, 26 Ind. App. 41, 59 N. E. 50; Haggerty v. Central R. Co., 31 N. J. L. 349; Whitford v. Panama R. Co., 23 N. Y. 465. Holding that the statute should be strictly construed. Thornburg v. American &c. Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. 334, and cases cited; L. J. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411; Illinois Cent. &c. R. Co. v. Johnson, 77 Miss. 727, 28 So. 753, 51 L. R. A. 837; Jackson v. St. Louis &c. R. Co., 87 Mo. 422, 56 Am. Rep. 460; Clark v. Kansas City &c. R. Co., 219 Mo. 524, 118 S. W. 40; Pittsburg &c. R. Co. v. Hine, 25 Ohio St. 629. See note in 70 Am. St. 672; 6 Thomp. Neg. (2d ed.) § 6985; St. Louis &c. R. Co. v. McNamare, 91 Ark. 515, 122 S. W. 102.

[19] Board v. Scearce, 2 Duv. (Ky.) 576; Burns v. Grand Rapids &c. R. Co., 113 Ind. 169, 15 N. E. 230; Raisor v. Chicago &c. R. Co., 215 Ill. 47, 74 N. E. 69, 106 Am. St. 153.

[20] Bigelow v. Nickerson, 70 Fed. 113, 30 L. R. A. 336; Nickerson v. Bigelow, 62 Fed. 900; The Robert Holland, 59 Fed. 200; The City of Norwalk, 55 Fed. 98. In the case last cited the court quoted with approval the statement in the opinion in Steamboat Co. v. Chase, 16 Wall. (U. S.) 532, 21 L. ed. 369, that "The statute does no more than take the case out of the operation of the common law maxim that an action for death dies with the person." And to same effect, see Moore v. Pywell, 29 App. D. C. 312, 9 L. R. A. (N. S.) 1078. But see Moore v. Pywell, 29 App. D. C. Flanders v. Georgia &c. R. Co., 68 Fla. 479, 67 So. 68; Mondou v. New York &c. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44.

[21] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. 192, 195; Western Un. Tel.

If a new right is not given, then it can hardly be true that the limitation forms part of the right, and yet it is uniformly held that it does form part of the right itself.[22] If there is no new right created, then it is difficult to sustain the decisions which hold that the law of the place of the accident governs,[23] for if there be nothing more than a remedy created, the statute of a foreign jurisdiction could not govern the courts of the place where the cause is tried. But some of the apparent conflict upon the subject is explained by the fact that the various statutes are not all of the same type or class, as will be shown in the next section. A statute giving a right of action for death caused by wrongful act is to be construed as including negligent acts of omission as well as of commission.[24] We suppose that the term "wrongful," as ordinarily employed, is to be taken as meaning actionable wrong, and that whether the act which causes death be a culpable breach of duty by failing or neglecting to do what the law requires or doing what the law forbids, there is a right of recovery. But so much depends upon the language of the particular statute that only very general statements can be safely made. The term "heirs at law" has been held to mean

Co. v. Preston, 254 Fed. 229; Pym v. Great Northern &c. R. Co., 4 Best & S. 396; Canadian &c. R. Co. v. Robinson, 19 Can. Sup. Ct. 292, 54 Am. & Eng. R. Cas. 49; Seward v. Vera Cruz, L. R. 10 App. Cas. 59; Blake v. Midland R. Co., 18 Q. B. 93, 21 L. J. Q. B. 233. See Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192.

[22] Post, § 2061.

[23] Post, § 2053. It is also true that the doctrine of the federal court is antagonistic to the rule that where the death is instantaneous there can be recovery, for there was no right in the decedent to recover damages had he survived and therefore none in his representatives after his death. Kearney v. Boston &c. R. Co., 9 Cush. (Mass.) 108; Hansford v. Payne, 11 Bush. (Ky.) 380; Hollenbeck v. Berskshire &c. R. Co., 9 Cush. (Mass.) 478; Mulcahey v. Washburn &c. Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. 458; Whitford v. Panama &c. R. Co., 23 N. Y. 465. Post, § 2050.

[24] American &c. R. Co. v. Johnson, 60 Fed. 503. See also Galveston &c. R. Co. v. Currie, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367n; Lipscomb v. Railway Co., 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. 804; Shannon v. Jefferson Co., 125 Ala. 384, 27 So. 977; American &c. Co. v. Guy, 25 Ind. App. 588, 58 N. E. 738; Bussey v. Gulf &c. R. Co., 79 Miss. 597, 31 So. 212. And compare also Louis-

or include the widow and children,[25] and in another case it was held that the term "heirs" includes all persons capable of inheriting from the deceased generally.[26]

§ 2048 (1361a). Two classes of statutes.—The statutes in different jurisdictions vary considerably in their provisions. But they may be divided into two general classes or types. This classification, though statutes of each class may differ somewhat from others of the same class as to the party entitled to maintain the action, the beneficiaries, the amount of damages that may be recovered, or in other particulars, includes most of the statutes upon the subject, although there are a few statutes, having peculiar features, that might, perhaps, be considered as not coming fairly within either class. The two classes referred to are: 1. Those which create an entirely new cause of action. 2. Those which provide merely for the survival of the action which the deceased would have had if he had survived.[27] In a few states there are statutes of both types.[28]

ville &c. R. Co. v. Stewart, 131 Ky. 665, 115 S. W. 775; Randolph v. Snyder, 139 Ky. 159, 129 S. W. 562; Western Union Tel. Co. v. Catlett, 177 Fed. 1, 40 L. R. A. (N. S.) 505. It is held that the Rhode Island statute does not embrace mere passive negligence or acts of omission. Myette v. Gross, 18 R. I. 729, 30 Atl. 602, citing Bradbury v. Furlong, 13 R. I. 15, 43 Am. Rep. 1.

[25] St. Louis &c. R. Co. v. Needham, 52 Fed. 371. See also Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789; Noble v. Seattle, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822. Statute giving right to "heir or heirs," if no husband or wife survives, held limited to lineal descendants in Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. 235; and Jordan v. Cincinnati &c. R. Co., 89 Ky. 40, 11 S. W. 1013.

[26] Redfield v. Oakland &c. R. Co., 110 Cal. 277, 42 Pac. 822. But see Johnson v. Seattle Elec. Co., 39 Wash. 211, 81 Pac. 705.

[27] Note in 70 Am. St. 676; 6 Thomp. Neg. §§ 6986, 6987. See also elaborate notes in L. R. A. 1915E, 1095, 1132, 1152.

[28] See St. Louis &c. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Denver &c. R. Co. v. Frederic, 57 Colo. 90, 140 Pac. 463; Louisville &c. R. Co. v. Will, 23 Ky. 1961, 66 S. W. 628; Dolson v. Lake Shore &c. R. Co., 128 Mich. 444, 87 N. W. 629; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537; Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797 and note; Davidson Benedict Co. v. Severson, 109 Tenn. 572, 72 S. W. 967; Brown v. Chicago &c. R. Co., 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579. See also as to Fed-

Under statutes of the first class the loss to the statutory beneficiaries by the death of the deceased is that for which the right of action is ordinarily given, and it makes no difference whether death was instantaneous or not.[29] But under statutes of the second class the action is for the damages sustained by the deceased, which he might have recovered if he had lived, and there can be no recovery, under some of them, at least, if death was instantaneous.[30] So, there may be a difference in the

eral Employers' Liability Act, Midland Val. R. Co. v. Le Moyne, 104 Ark. 327, 148 S. W. 654; ante chapter lviii. And see under Maryland statute, Stewart v. United Elec. &c. Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. 410. In some of these cases a recovery under one is held a bar to a recovery under the other but in some of the others it is held that there may be a recovery under both. See, especially, the Michigan and Wisconsin cases, on opposite sides of the question. As to joinder in certain cases under the Massachusetts statute, see Smith v. Thompson-Houston Elec. Co., 188 Mass. 371, 74 N. E. 644. See also Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665. As to actions for death employes under the Massachusetts statute and to their not being aided by the employers' liability act, see Vecchioni v. New York &c. R. Co., 191 Mass. 9, 77 N. E. 306.

[29] Matz v. Chicago &c. R. Co., 85 Fed. 180; Sternenberg v. Mailhos, 99 Fed. 43; Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. 278 and note; Worden v. Humeston &c. R. Co., 72 Iowa 201, 33 N. W. 629; Givens v. Kentucky Cent. R. Co., 89 Ky. 231; Louisville &c. R. Co. v. Coniff, 90 Ky. 560, 14 S. W. 543; Perham v. Portland &c. Co., 33 Ore. 451, 53 Pac. 12, 24, 40 L. R. A. 799, 72 Am. St. 730; Reed v. Northeastern R. Co., 37 S. Car. 42, 16 S. E. 289; Northeastern R. Co., Ex parte, 60 S. Car. 401, 38 S. E. 634, 54 L. R. A. 660; International &c. R. Co. v. Kindred, 57 Tex. 491; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Boyden v. Fitchburg &c. R. Co., 70 Vt. 125, 39 Atl. 771. Compare also Garrett v. Louisville &c. R. Co., 197 Fed. 715; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 1925, 57 L. ed. 417, Ann. Cas. 1914C, 177; Brown v. Buffalo &c. R. Co., 22 N. Y. 191. But in a few states the death must be instantaneous or without conscious suffering. Sawyer v. Perry, 88 Maine 42, 33 Atl. 660; Bligh v. Biddeford R. Co., 94 Maine 499, 48 Atl. 112; Conley v. Portland &c. Co., 96 Maine 281, 52 Atl. 656. Compare Dolson v. Lake Shore &c. R. Co., 128 Mich. 444, 87 N. W. 629, and cases cited in the different opinions there given; Hennessy v. Bavarian Brew. Co., 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. 554.

[30] McVey v. Illinois Cent. R. Co., 73 Miss. 487, 19 So. 209; Illinois Cent. R. Co. v Pendergrass, 69

parties entitled to bring the action, the beneficiaries, or the like, as well as in the damages to be recovered, and under a mere survival statute the deceased in his lifetime may usually contract in regard to the amount or release of damages[31] when he could not do so under statutes of the other class, at least in some jurisdictions, so as to bar the beneficiaries.[32]

§ 2049 (1362). Limiting the right to sue—Designating the forum.—The statute which gives a right to sue may limit the time in which the action shall be brought, may limit the amount of recovery, and may also limit the persons who shall receive the damages recovered. Upon the propositions stated there is

Miss. 425, 12 So. 954; Belding v. Black Hills &c. R. Co., 3 S. Dak. 369, 53 N. W. 750. See Hastings Lumber Co. v. Garland, 115 Fed. 15; Davis v. St. Louis &c. R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; St. Louis &c. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Budd v. Meriden &c. Co., 69 Conn. 272, 37 Atl. 683; Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Mulcahey v. Washburn &c. Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. 458; Storrie v. Grand Trunk &c. Co., 134 Mich. 297, 96 N. W. 569; Olivier v. Houghton County St. R. Co., 134 Mich. 367, 96 N. W. 434, 104 Am. St. 607; Carolina &c. Ry. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605 and note; also note in L. R. A. 1915E, 1119.

[31] See Hill v. Pennsylvania R. Co., 178 Pa. St. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. 754; Illinois Cent. &c. R. Co. v. Cozby, 69 Ill. App. 256; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412, 417, 419, 53 N. E. 419; Hurst v. Detroit City R., 84 Mich. 539, 48 N. W. 44; Price v. Railroad Co., 33 S. Car. 556, 12 S. E. 413, 26 Am. St. 700; Rowe v. Richards, 35 S. Dak. 201, 151 N. W. 1001, L. R. A. 1915E, 1075 (citing § 2065 post), Ann. Cas. 1918A, 294; Brown v. Electric R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. 666 and note. In Lyon v. Boston &c. R. Co., 107 Fed. 386, it is held that the New Hampshire statute there set out does not create a new right of action but is a survival statute with enlarged and remedial damages, that if it had given a new cause of action it would have been transitory and the action could have been brought wherever there was jurisdiction of the defendant, but, as it could come to the administrator only by survival, under such statute, the administrator must be such a one as it would survive to, and that the survival could be only where the right is. See also as to statute of limitations, Whaley v. Catlett, 103 Tenn. 347, 53 S. W. 131.

[32] Under most of such statutes, however, as well as under a mere survival statute, it is generally held that a valid release or the like by the injured person prevents an ac-

no diversity of opinion. How much further the state may go in limiting the right is a question, which, in some of its phases, may fairly admit of debate. There is reason for affirming that the power to give or withhold the principal thing carries with it the power to annex the incidents. It would seem, therefore, that the power of the state to give or withhold includes the power to provide the forum in which the remedy for the enforcement of the newly given right shall be sought. But it has been held by an able court, not, however, without a vigorous dissent, that the provision of a statute which assumes to confine the right to sue for causing death by wrongful act to the state courts, and thus exclude the jurisdiction of the federal courts, is invalid, the theory of the decision being that the state cannot exclude the jurisdiction of the federal tribunals. That the state cannot exclude the jurisdiction of the federal courts where the right to be vindicated is a general one is entirely clear, but it is not so clear that where a statute gives an entirely new right—one of its own creation—that did not exist at common law, the state legislature may not prescribe the terms and conditions upon which it may be enforced.[33] The recent Act of Congress

tion by his heirs or personal representative for his death, for the reason, chiefly, that such statutes provide that the right of action for death shall exist only where the injured person could have maintained action himself if he had lived. Louisville &c. R. Co. v. Raymond, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176, and other cases there cited in note; State v. United Rys. &c. Co., 121 Md. 457, 88 Atl. 229, L. R. A. 1915E, 1163 and note; Mehegan v. Boyne City &c. R. Co., 178 Mich. 694, 141 N. W. 905, L. R. A. 1915E, 1170 and note; also note to British Columbia Elec. R. Co. v. Turner, 49 Can. Sup. Ct. 470, Ann. Cas. 1914D, 499; and post § 2065. But compare Western Un. Tel. Co. v. Preston, 254 Fed. 229.

[33] Bigelow v. Nickerson, 70 Fed. 113, 30 L. R. A. 336. Other cases approving or supporting the majority opinion are Williams v. Crabb, 117 Fed. 193, 197, 59 L. R. A. 425, and decisions there cited. In the case cited, Showalter, J., dissented, and referred in support of his dissent to Dudley v. Mayhew, 3 N. Y. 9; Janney v. Buell, 55 Ala. 408; Phillips v. Ash, 63 Ala. 414; Chandler v. Hanna, 73 Ala. 390; Dickinson v. Van Wormer, 39 Mich. 141; Hollister v. Hollister Bank, 2 Keyes (N. Y.) 245; Vestry of St. Pancras v. Batterbury, 2 C. B. (N. S.) 477. See generally Chicago &c. R. Co. v. Whitton, 13

on the subject, however, is paramount and exclusive where the facts of the case bring it within that act.[34]

§ 2050 (1363). **Instantaneous death.**—Some of the courts hold that where death is instantaneous no action can be maintained by the personal representatives of the deceased,[35] but there is authority holding that the action will lie although death is instantaneous.[36] Much, however, depends upon the wording and intent of the particular statute involved and the class to which it belongs.[37] A distinction is made by some of the courts between cases where the statute confers the right of action upon

Wall. (U. S.) 270, 20 L. ed. 571; Baltimore &c. R. Co v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. ed. 677; Austin's Admr. v. Pittsburg &c. R. Co., 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756n; In re Meng, 227 N. Y. 264, 125 N. E. 508, 227 N. Y. 669, 126 N. E. 914.

[34] Ante, § 1960. See also Flanders v. Georgia &c. Ry. Co., 68 Fla. 479, 67 So. 68; notes in 38 L. R. A. (N. S.) 44, and 47 L. R. A. (N. S.) 1.

[35] McVey v. Illinois Cent. R. Co., 73 Miss. 487, 19 So. 209 (citing Illinois &c. R. Co. v. Pendergrass, 69 Miss. 425, 12 So. 954; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537); Sawyer v. Perry, 88 Maine 42, 33 Atl. 660. See Belding v. Black Hills &c. R. Co., 3 S. Dak. 369, 53 N. W. 750; State v. Maine &c. R. Co., 60 Maine 490; State v. Grand Trunk &c. R. Co., 61 Maine 114, 14 Am. Rep. 552; Commonwealth v. Metropolitan &c. R. Co., 107 Mass. 236; note in L. R. A. 1915E, 1119. This is generally true where the statute is a mere survival statute. See also Ely v. Detroit United Ry. Co., 162 Mich. 287, 127 N. W. 259; Dillon v. Great Northern R. Co., 38 Mont. 485, 100 Pac. 960.

[36] Broughel v. Southern &c. Co., 73 Conn. 614, 48 Atl. 751, 84 Am. St. 176; Conners v. Burlington &c. R. Co., 71 Iowa 490, 32 N. W. 465, 60 Am. Rep. 814; Worden v. Humeston &c. R. Co., 72 Iowa 201, 33 N. W. 629; Hamilton v. Morgan &c. Co., 42 La. Ann. 824, 8 So. 586; Anderson v. Wetter, 103 Maine 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003; Brown v. Buffalo &c. R. Co., 22 N. Y. 191; Nashville &c. R. Co., v. Prince, 2 Heisk. (Tenn.) 580; Fowlkes v. Nashville &c. R. Co., 5 Baxter (Tenn.) 663; 6 Thomp. Neg. (2d ed.) §§ 6986, 6987.

[37] Where the statute is of the type of Lord Campbell's Act and gives a new cause of action, the general rule is that there may be a recovery even where death is instantaneous. In addition to authorities cited in note 36, see also West v. Detroit United Ry. Co., 159 Mich. 269, 123 N. W. 1101; Dillon v. Great Northern R. Co., 38 Mont. 485, 100 Pac. 960. See Ante § 2048, and compare Oulighan v Butler, 189 Mass. 287, 75 N. E. 726

personal representatives and cases where the right is conferred upon the widow or children of the deceased person.[38] Very subtle and fine-drawn distinctions are made in considering the question whether death was or was not instantaneous, and it is held that it cannot be concluded that the death was not instantaneous although there were spasmodic muscular movements after the injury.[39]

§ 2051 (1364). Statutes have no extraterritorial effect.—It is elementary learning that a statute has no force beyond the territorial limits of the state by which it was enacted. This rule applies to cases of personal injuries made actionable by legislation.[40] If there is no legislation giving a right of action, then no such right exists unless it is given by the common law. If the

[38] See cases cited from Mississippi reports in the first note to this section.

[39] Kearney v. Boston &c. R. Co., 9 Cush. (Mass.) 108; Bancroft v. Boston &c. R. Co., 11 Allen (Mass.) 34; Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Mulchahey v. Washburn &c. Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. 458. See also Kellow v. Cent. &c. R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858. And compare generally St. Louis &c. R. Co. v. Robertson, 103 Ark. 361, 146 S. W. 482; West v. Detroit United Ry. Co., 159 Mich. 269, 123 N. W. 1101; Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144, 149 N. W. 14. It was held in Dietrich v. Northampton, 138 Mass. 14, 52 Am. R. 242, that a child prematurely born, which lived a very few minutes after its birth was not a "person" within the meaning of the statute. See Sawyer v. Perry, 88 Maine 42, 33 Atl. 660, for a definition of the term "immediate death." See as to there being no recovery in Massachusetts under employers' liability act where there is conscious suffering. Martin v. Boston &c. R. Co., 175 Mass. 502, 56 N. E. 719.

[40] Knight v. West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200, 26 Am. & Eng. R. Cas. 485; De Harn v. Mexican &c. R. Co., 86 Tex. 68, 23 S. W. 381; Willis v. Missouri Pac. R. Co., 61 Tex. 432, 48 Am. Rep. 301, 23 Am. & Eng. R. Cas. 379; Texas &c. R. Co. v. Richards, 68 Tex. 375, 4 S. W. 627. See Wall v. Chesapeake &c. Ry. Co., 290 Ill. 227, 125 N. E. 20; Johnson v. Chicago &c. R. Co., 91 Iowa 248, 59 N. W. 66; Boyce v. Wabash &c. R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730, 23 Am. & Eng. R. Cas. 172; Morris v. Chicago &c. R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39, 19 Am. & Eng. R. Cas. 180; McCarthy v. Chicago &c. R. Co., 18 Kans. 46, 26 Am. Rep. 742; Needham v. Grand Trunk R. Co., 38 Vt. 294.

common law makes the wrong actionable, or if it is made actionable by the statutes of the state in which the wrong is committed, then, as we shall presently see, a remedy will generally be supplied by the state where the action is brought. Where the statute of the state in which the injury was received is not pleaded the rule in cases where the action is brought in another state is that the court will presume that the common law was in force.[41]

§ 2052 (1365). The right and the remedy.—The rule is that the law of the forum governs as to the remedy, including the mode of proceeding and all matters therewith directly connected.[42] It is obvious that a foreign state or nation cannot prescribe rules of procedure for the government of other states or nations, so that the rules of procedure, including the rules of evidence, are those prescribed by the law of the forum.[43] But

[41] Burdict v. Missouri &c. R. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, and note 45 Am. St. 528; LeForest v. Tolman, 117 Mass. 109, 19 Am. Rep. 400; Hyde v. Wabash &c. R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820, 15 Am. & Eng. R. Cas. 503; Davis v. New York &c. R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138, 28 Am. & Eng. R. Cas. 223; Wooden v. Western &c. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458 and note 22 Am. St. 803; Buckles v. Ellers, 72 Ind. 220, 37 Am. Rep. 156 and note.

[42] Helton v. Alabama &c. R. Co., 97 Ala. 275, 12 So. 276; Smith v. Wabash R. Co., 141 Ind. 92, 105, 40 N. E. 270; Higgins v. Central &c. R. Co., 155 Mass. 176, 181, 29 N. E. 534, 31 Am. St. 544; Herrick v. Minneapolis &c. R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Hurley v. Missouri &c. R. Co., 57 Mo. App. 675; Knight v. West Jersey R. Co., 108 Pa. St. 250, 56 Am. Rep. 200; Dulin v. McCaw, 39 W. Va. 721; 20 S. E. 681. See also Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; Slater v. Mexican &c. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900; Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Wooden v. Western N. Y. &c. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. 803; Eingartner v. Illinois &c. Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. 859.

[43] In Richmond &c. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290, it is said: "Touching the evidence requisite to make a prima facie case in behalf of the plaintiff, the court gave in charge to the jury the law applicable in this state between the parties where the action is against a railroad company. This

the state or nation may enact laws governing the conduct and prescribing the responsibility for wrongs of persons within its jurisdiction. It is true that there is no absolute right in any person to an enforcement of such laws by the courts of other states or nations, but upon the principle of comity such laws are generally enforced. We do not mean, of course, that one state will enforce the penal laws of another state, for it is well settled that the penal laws of a state can only be enforced by its own courts.[44] The ruling in Pennsylvania is that the person entitled to sue in the state where the injury was received is the person who must sue, although the action is brought in another state. The theory of the court was that the question of who may sue is not a question of remedy merely, but pertains to the right.[45] This, we believe, to be sound doctrine, for, as a new right was created, all incidents, whether in the form of limitations as to the amount of recovery, or as to who may be beneficiaries, travel with the right into the foreign jurisdiction.[46]

was correct although the injury sued for was sustained in the state of Alabama. The quantity or degree of evidence requisite to sustain the action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose." See also Smith v. Wabash &c. R. Co., 141 Ind. 92, 40 N. E. 270; Stewart v. Baltimore &c. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537; Johnson v. Chicago &c. R. Co., 91 Iowa 248, 59 N. W. 66; Nicholas v. Burlington &c. R. Co., 78 Minn. 43, 80 N. W. 776; Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768; Knight v. West Jersey &c. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200.

[44] Gwin v. Breedlove, 2 How. (U. S.) 29, 11 L. ed. 16; Gwin v. Barton, 6 How. (U. S.) 7, 12 L. ed. 582; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544, and authorities cited in last note to next following section.

[45] Usher v. West Jersey &c. R. Co., 126 Pa. St. 206, 17 Atl. 597, 4 L. R. A. 261 and note, 12 Am. St. 863; Derr v. Lehigh Valley &c. R. Co., 158 Pa. St. 365, 27 Atl. 1002, 38 Am. St. 848. The same doctrine is declared in Oates v. Union Pacific R. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. 348. In the case last cited the court distinguishes the case of Vawter v. Missouri &c. R. Co., 84 Mo. 679, 54 Am. Rep. 105. See also Hartray v. Chicago Rys. Co., 290 Ill. 85, 124 N. E. 849.

[46] Other authorities supporting our conclusion are cited in the last note to § 2060, post. See also generally, Ambruster v. Chicago &c. R. Co., 166 Iowa 155, 147 N. W. 337; Baltimore &c. R. Co. v. Cham-

§ 2053 (1366). **Conflict of law.**—The general rule is that the right to recover for damages resulting from personal injuries is governed by the law of the place where the injury was received and not by the law of the forum.[47] This well-known general rule applies, as we have shown, to actions brought to recover damages for injuries causing death. The rule now generally approved is that the courts of one state will enforce the statutes of another state giving civil rights unless such statutes are in conflict with the laws or policy of the state in which the action is

bers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012. But it is held that although the statute of the state where the injury and death took place allows only compensatory damages this does not prevent an action in another state whose satute allows both compensatory and punitive damages, if the action is solely for compensatory damages. Rochester v. Wells Fargo Express, 87 Kans. 164, 123 Pac. 729, 40 L. R. A. (N. S.) 1095 and note. See also Texas &c. R. Co. v. Gross, 60 Tex. Civ. App. 621, 128 S. W. 1173.

[47] Northern &c. R. Co. v. Mase, 63 Fed. 114; Johnson v. Union Pac. &c. Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; note to Boston &c. R. Co. v. Hurd, 108 Fed. 116, in 56 L. R. A. 193, et seq., where many cases are cited. See Conflict of Laws, Concerning Actions for Death, 35 Central L. J. 185; DeValle DaCosta v. Southern Pac. Co., 167 Fed. 654; In re Coe, 130 Iowa 307, 106 N. W. 743, 4 L. R. A. (N. S.) 814, 114 Am. St. 416; White v. Minneapolis &c. R. Co., 147 Wis. 141, 133 N. W. 148. In a recent case the negligent act causing death occurred in Pennsylvania and the court held that the action was properly brought in Pennsylvania under the statute of that state although the death itself occurred in New Jersey. Centofanti v. Pennsylvania R. Co., 244 Pa. 255, 90 Atl. 558. "The liability, with very rare exceptions, for torts depends upon the law of the place where the wrong was done or act committed, and the law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there; and while actions for torts recognized by the common law may be maintained in a different state than that in which the tort was committed, without allegation or proof of the lex loci, upon the presumption that the lex loci is the same as the lex fori, yet this presumption does not obtain where the cause of the action is conferred by statute, because it can not be presumed that the statutes of one state correspond with those of another. Cuba Ry. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. ed. 274, 38 L. R. A. (N. S.) 40. See also McDonald v. Mallory, 77

brought.[48] There is, however, authority to the contrary.[49] Some of the courts hold that the statutes of the state in which the injury was received must be similar to those of the state in which

N. Y. 547, 33 Am. Rep. 664, where the general rule is clearly stated." Williams v. William B. Scaife & Sons Co., 227 Fed. 922.

[48] Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439; Texas &c. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; Northern &c. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; Stewart v. Baltimore &c. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537; Tennessee &c. R. Co. v. George, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. ed. 997; Weissengoff v. Davis, 260 Fed. 16; Northern &c. R. Co. v. Mase, 33 Fed. 114; Theroux v. Northern &c. R. Co., 64 Fed. 84; St. Louis &c. R. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. 65; Denver &c. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; South Carolina &c. R. Co. v. Nix, 68 Ga. 572; Hanna v. Grand Trunk &c. R. Co., 41 Ill. App. 116; Wall v. Chesapeake &c. Ry. Co., 290 Ill. 227, 125 N. E. 20; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. 67; Wabash R. Co. v. Hassett, 170 Ind. 370, 83 N. E. 705; Boyce v. Wabash &c. R. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730; Armbruster v. Chicago &c. R. Co., 166 Iowa 155, 147 N. W. 337; Higgins v. Central &c. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. 544; Walsh v. New York &c. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. 514; Walsh v. Boston &c. R. R., 201 Mass. 527, 88 N. E. 12; Nicholas v. Burlington &c. R. Co., 78 Minn. 43, 80 N. W. 776; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; McMaster v. Illinois &c. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. 653; Stoeckman v. Terre Haute &c. R. Co., 15 Mo. App. 503; Missouri &c. R. Co. v. Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67 and note; Leonard v. Columbia &c. R. Co., 84 N. Y. 48, 38 Am. Rep. 491; O'Reilly v. New York &c. R. Co., 16 R. I. 388, 17 Atl. 906, 29 Cent. L. J. 210, 6 L. R. A. 719; Texas &c. R. Co. v. Richards, 68 Tex. 375, 4 S. W. 627; St. Louis &c. R. Co. v. Sizemore, 53 Tex. Civ. App. 491, 116 S. W. 403; Nelson v. Chesapeake &c. R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583 and note, 54 Am. & Eng. R. Cas. 82; Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. 859, note in 14 Am. St. 354. In Northern &c. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958, the doctrine of Judge Rorer that the law of the forum and of the place of the injury must concur is expressly denied. An extreme application of the rule was made in Mexican &c. R. Co. v. Jackson (Tex.), 32 S. W. 230. Compare Williams v. Camden &c. R. Co., 138 Fed. 571; Slater v. Mexican &c. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900.

[49] McCarthy v. Chicago &c. R. Co., 18 Kans. 46, 26 Am. Rep. 742; Richardson v. New York &c. R. Co., 98 Mass. 85; Woodard v.

the action is brought.[50] A peculiar case came under judgment in South Carolina. In that case the action was brought in South Carolina for an injury received in North Carolina. The law of North Carolina provided that a child could only be held to the exercise of care according to its age; the trial court charged that the case was governed by the law of North Carolina, and this was held to be correct.[51] The case referred to is very near the line, if, indeed, it is not unsound, for the question would seem to be one of evidence, and hence to pertain to the remedy, and not the right.[52] It seems to us, as we have elsewhere indicated, that where punitive damages are given the statute cannot have an extra territorial effect.[53] An Illinois statute provides that no action shall be brought or prosecuted in that state to recover damages for death occurring outside of the state, and this is held

Michigan &c. R. Co., 10 Ohio St. 121; Armstrong v. Beadle, 5 Sawyer (U. S.) 484. See Anderson v. Milwaukee &c. R. Co., 37 Wis. 321; Mackay v. Central R. Co., 14 Blatch. (U. S.) 65, 4 Fed. 617; Louisville &c. R. Co. v. Williams, 113 Ala. 402, 21 So. 938; Bruce v. Cincinnati &c. R. Co., 83 Ky. 174; Ash v. Baltimore &c. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. 461; Runt v. Illinois Cent. R. Co., 88 Miss. 575, 41 So. 1; Vawter v. Missouri &c. R. Co., 84 Mo. 679, 54 Am. Rep. 105; St. Louis &c. R. Co. v. McCormick, 71 Tex. 660, 9 S. W. 540; De Ham v. Mexican Nat. R. Co. (Tex. Civ. App.), 22 S. W. 249; Phillips v. Eyre, L. R. 6 Q. B. 1, 28, 29. See also Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. ed. 516.

[50] Wooden v. Western &c. R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. 803; Debevoise v. New York &c. R. Co., 98 N. Y. 377, 50 Am. Rep. 683. See also Wabash R. Co. v. Fox, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. 739; Baltimore &c. R. Co. v. Chambers, 73 Ohio 16, 76 N. E. 91.

[51] Bridger v. Asheville &c. R. Co., 25 S. Car. 24, 3 S. E. 860, citing Atlanta R. Co. v. Tanner, 63 Ga. 384; Atchison &c. R. Co. v. Moore, 29 Kans. 632.

[52] See ante, § 2052.

[53] Raisor v. Chicago &c. R. Co., 215 Ill. 47, 74 N. E. 69, 106 Am. St. 153; Marshall v. Wabash R. Co., 46 Fed. 269; Matthewson v. Kansas City &c. R. Co., 61 Kans. 667, 60 Pac. 747; Adams v. Fitchburg &c. R. Co., 67 Vermont 76, 30 Atl. 687, 48 Am. St. 800; O'Reilly v. New England R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244. But see where such damages were not claimed and only compensatory damages the same as allowed by statute of forum were sued for, Rochester v. Wells Fargo &c. Express, 87 Kans. 164, 123 Pac. 729, 40 L. R. A. (N. S.) 1095.

to be constitutional and to include actions on the statutes of other states as well as those under the local statutes.[54]

§ 2054 (1366a). **Aliens.**—The question has arisen in a number of cases as to whether the statutes giving a right of action for death or injuries resulting in death, such as those under consideration in this chapter, apply in favor of non-resident aliens. There were few decisions upon the subject until recently, but within the last few years the question has been decided by many of the courts. The weight of authority is to the effect that such statutes, being broad enough in terms, as most of them are, to include all persons of the class designated, apply in favor of non-resident aliens as well as others.[55] But there are decisions di-

[54] Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N. E. 619, L. R. A. 1915F, 955, Ann. Cas. 1913D, 568 n. See also Chambers v. Baltimore &c. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143; Spokane &c. R. Co. v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. ed. 1060, L. R. A. 1915F, 736.

[55] Vetaloro v. Perkins, 101 Fed. 393; Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438; Baltimore &c. R. Co. v. Baldwin, 144 Fed. 53; Bonthron v. Phoenix &c. Co., 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563; Taylor v. Albion Lumber Co., 176 Cal. 347, 168 Pac. 348, L. R. A. 1918B, 185; Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285; Romano v. Capital &c. Co., 125 Iowa 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. 323; Atchinson &c. R. Co. v. Fajardo, 74 Kans. 314, 86 Pac. 681, 6 L. R. A. (N. S.) 681; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. 309; Renlund v. Commodore &c. Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. 934; Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230, 108 Am. St. 815; Tanas v. Municipal &c. Co., 88 App. Div. (N. Y.) 251, 84 N. Y. S. 1053; Pittsburg &c. R. Co. v. Naylor, 73 Ohio St. 115, 76 N. E. 505; Davidsson v. Hill (1901), 2 K. B. 606. See also Syymasski v. Blumenthal, 3 Penn. (Del.) 558, 52 Atl. 347; Luke v. Calhoun, 52 Ala. 115; Augusta &c. R. Co. v. Glover, 92 Ga. 142, 18 S. E. 406; Kellyville v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. 191; Rietveld v. Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Trotta v. Johnson, 28 Ky. L. 851, 90 S. W. 540; Lykiardopoulo v. New Orleans &c. Co., 127 La. 309, 53 So. 575, Ann. Cas. 1912A, 976; Mascitelli v. Union Carbide Co., 151 Mich. 693, 115 N. W. 721; Bombolis v. Minneapolis &c. R. Co., 128 Minn. 112, 150 N. W. 385; Philes v. Missouri Pac. R. Co., 141 Mo. App. 561, 125 S. W. 553; Pocahontas &c. Co. v. Ruka, 104 Va. 278, 51 S. E. 449; Low Moor Iron Co. v. La Bianca, 106 Va. 83, 55 S. E. 532, 9 Ann. Cas. 1177.

rectly to the contrary.[56] The decisions applying the statute in favor of non-resident aliens are based, in general, upon the propositions that they are included within the letter of the statute, and that, if the legislature had meant to except them from the benefit of its provisions, it would have so provided; that the purpose of such legislation is to supply an omission in the common law and to protect or give compensation to those who suffer pecuniary loss by the death of a person caused by the negligence of another, regardless of their residence or citizenship; and that there is nothing contrary to policy in this view, but, on the contrary, it is more in consonance with the policy and spirit of our institutions.[57] The decisions to the effect that the statute does not

[56] Brannigan v. Union Gold Min. Co., 93 Fed. 164; Deni v. Pennsylvania R. Co., 181 Pa. St. 525, 37 Atl. 558, 59 Am. St. 676; Maiovana v. Baltimore &c. R. Co., 216 Pa. St. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. 778, affd. in 213 U. S. 268, 29 Sup. Ct. 424, 53 L. ed. 792; McMillan v. Spider Lake &c. Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. 947; Adam v. British &c. Co., (1898), 2 Q. B. 430; Utah &c. Co. v. Diamond &c. Co., decided by the district court of the Second Judicial District of Utah and referred to in Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34, 70 N. E. 839, 841; Pennsylvania has since enacted a law making the rule there the same as in the great majority of the states. Act of June 7, 1911 (P. L. 678); the Brannigan case has been overruled in Petek v. American Smelting &c. R. Co., 154 Fed. 190, 21 L. R. A. (N. S.) 273, and, as shown in a preceding note the latest English decision is to the same effect as the majority rule.

[57] See cases cited in first note to this section, particularly Alison v. Bush Co., 182 N. Y. 393, 75 N. E. 230; Pittsburgh &c. R. Co. v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473 and note; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 336, 54 L. R. A. 934, 79 Am. St. 309. Additional reasons are suggested in the first and la t cases cited, but we think the Massachusetts statute involved in the last case is in several respects distinguishable from most of the statutes, and that some of the reasons there given, even if good under that statute, would not apply to all See Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34, 70 N. E. 839. So, as shown by the withdrawal of the original opinion in the Osgood case last above cited, and the substitution of an opinion taking the opposite view, as reported in 36 Ind. App. 34, 73 N. E. 285, the apparent change in the view of the English court in Davidsson v. Hill (1901), 2 K. B. 606, holding the statute applicable in favor of aliens, has exerted an important influence on the courts in

apply in favor of non-resident aliens are based, in the main, upon the propositions that in general statutes are to be understood as applying only to those who owe obedience to the legislature which enacts them, and that it has no concern to protect the rights of non-resident aliens; that the object of such statutes is to protect those within the jurisdiction, to prevent them from becoming a public charge, or the like, and not to favor those in another country, put burdens on our own people and require them to pay out money to be taken to a foreign country, which, perhaps, may recognize no such right in favor of our own citizens; and that, if the legislature had intended to give non-resident aliens such rights, it would have done so by express language.[58]

§ 2055 (1367). **Who may recover—Generally.**—To determine who may recover for the death of a human being, the statute in force at the place where the accident occurred must be consulted. It is therefore, not possible to state anything more than general rules without considering the different statutes, and that would be foreign to our purpose. It may, of course, be safely said that those persons, and only those persons, to whom the statute gives the right of action can recover, for there is no general or common-law right.[59] It is an established rule of the

the later decisions in this country. A federal court has held itself bound by the construction given by the state court to the Pennsylvania statute Zeigler v. Pennsylvania R. Co., 151 Fed. 348.

[58] One of the strongest opinions presenting this view is that in Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34, 70 N. E. 839 (afterwards withdrawn), where most of the other decisions and text-books tending to sustain such view are quoted from.

[59] "The Alaska," 130 U. S. 201, 9 Sup. Ct. 461, 32 L. ed. 923; Western Union Tel. Co. v. McGill, 57 Fed. 699, 21 L. R. A. 818, citing St. Louis &c. R. Co. v. Needham, 52 Fed. 371; McFadden v. St. Paul &c. Co., 263 Ill. 441, 105 N. E. 314; Jeffersonville &c. R. Co. v. Swayne, 26 Ind. 477; Thornburg v. American &c. Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. 334; Kansas Pac. R. Co. v. Cutter, 19 Kans. 83; Perry v. St. Joseph &c. R. Co., 29 Kans. 420; Eureka v. Merrifield, 53 Kans. 794, 37 Pac. 113; Louisville v. Hart, 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207; Clark v. Kansas City &c. R. Co., 219 Mo. 524, 118 S. W. 40; Safford v. Drew, 3 Duer (N. Y.) 627; Dickins v. New York &c. R. Co., 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389;

common law[60] that there can be no liability for injury resulting from negligence, unless there is a breach of a specific duty owing to the person who sustains an injury, and the general principle must apply to statutes giving a right of action for wrongfully causing death, in the sense that the right created by the statute must be shown to be in the person or persons by whom the action is prosecuted,[61] for it is only as to such persons that there is a duty to respond in damages.

§ 2056 (1368). Who may recover—Illustrative cases.—We shall not attempt to give all the cases which consider and decide who may maintain an action, but shall refer to such cases as seem to host clearly outline the rulings of the courts upon the general subject, premising our reference by the statement that the statutes vary so much that it is exceedingly difficult to extract general rules or to select the cases which best outline the views of the courts. The husband of the mother of an illegitimate child is not entitled to maintain an action for the death of the child under the provisions of a statute vesting the right of action in a father.[62] The English courts have held that a bastard is

Trafford v. Adams Express Co., 8 Lea (Tenn.) 96; Burke v. Cork &c. R. Co., 10 Cent. L. J. 48; Blake v. Midland R. Co., 10 Eng. Law & Eq. 437; Duckworth v. Johnson, 4 Hurl. & N. 653. And only for the benefit of the persons within the statute and only for the recovery of such damages as are contemplated by it. Swift Co. v. Johnson, 138 Fed. 867.

[60] O'Donnell v. Providence &c. R. Co., 6 R. I. 211; Smith v. Tripp, 13 R. I. 152; Atkinson v. Newcastle &c. Co., L. R. 2 Exch. Div. 441; Metallic &c. Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689; Holland v. Sparks, 92 Ga. 753, 18 S. E. 990.

[61] Clay v. Central &c. R. Co., 84 Ga. 345, 10 S. E. 967; Daniels v. Savannah &c. R. Co., 86 Ga. 236, 12 S. E. 365; Augusta &c. R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145. See also James v. Richmond &c. R. Co., 92 Ala. 231, 9 So. 335; Hilliker v. Citizens' St. R. Co., 152 Ind. 86, 52 N. E. 607; Louisville &c. R. Co. v. Jones, 45 Fla. 407, 34 So. 246; Brown v. Chicago &c. R. Co., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579; Winnt v. International &c. R. Co., 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172 and note. See generally as to parties plaintiff and joinder of beneficiaries, notes to Flash v. Louisiana W. R. Co., 137 La. 352, 68 So. 636, L. R. A. 1916E, 118, et seq.

[62] Thornburg v. American &c.

not a child within the meaning of Lord Campbell's act,[63] and a Canadian court has held that the mother of an illegitimate child has no right of action.[64] Most of the American courts have asserted the same general doctrine,[65] but others have adopted a different rule.[66] We incline to the opinion, that where the right of action is given, as it is by some of the statutes, for the benefit of "dependents," a mother of a bastard might recover, in the proper case, and so might the bastard in the case of the death

Co., 141 Ind. 443, 41 N. E. 1062, 50 Am. St. 334.

[63] Dickinson v. Northeastern R. Co., 2 Hurl. & Colt. 735. See Clarke v. Carfin Coal Co., L. R. (1891) A. C. 412. Grandchildren not included in term "children" in Indiana statute. Pittsburgh &c. R. Co. v. Reed, 44 Ind. App. 635, 88 N. E. 1080.

[64] Gibson v. Midland R. Co., 2 Ont. R. 658.

[65] Harkins v. Philadelphia R. Co., 15 Phila. (Pa.) 286; McDonald v. Southern R., 71 S. Car. 352, 51 S. E. 138; McDonald v. Pittsburgh &c. R. Co., 144 Ind. 459, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. 185; Robinson v. Georgia R. &c. Co., 117 Ga. 168, 43 S. E. 452, 60 L. R. A. 555, 97 Am. St. 156; Alabama &c. R. Co. v. Williams, 78 Miss. 209, 28 So. 853, 51 L. R. A. 836, 84 Am. St. 624. See also Citizens' St. R. Co. v. Cooper, 22 Ind. App. 459, 54 N. E. 1092, 72 Am. St. 319. Sesostris Youchican v. Texas &c. Ry. Co., 147 La. 1080, 86 So. 551. In Marshall v. Wabash R. Co., 46 Fed. 269, the court said that a bastard was not a "child" within the meaning of the statute, and referred to Barns v. Allen, 9 Am. Law. Reg. 747, but as it was held that the court had no jurisdiction (which holding, by the way, was erroneous), the statement that an illegitimate child was not within the statute was mere obiter dictum. It has also been held that a stepchild or stepfather can not recover for the death of the other as a child or parent. Marshall v. Macon &c. Co., 103 Ga. 725, 30 S. E. 571, 41 L. R. A. 211, 68 Am. St. 140; Hennessy v. Bavarian Brew. Co., 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. 554. So, as to adopted child in New Jersey, Heidecamp v. Jersey City &c. R. Co., 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. 707. See also Mount v. Tremont Lumber Co., 121 La. 64, 46 So. 103, 16 L. R. A. (N. S.) 199, 126 Am. St. 312, 15 Ann. Cas. 148. .

[66] Muhl v. Michigan &c. R. Co., 10 Ohio St. 272. See also Security &c. Co. v. West Chicago St. R. Co., 91 Ill. App. 332; L. T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411 (mother next of kin of illegitimate child); Marshall v. Wabash R. Co., 120 Mo. 275, 25 S. W. 179; Galveston &c. R. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S. W. 705 (to same effect as Indiana case). But compare Runt v. Illinois Cent. R. Co., 88 Miss. 575, 41 So. 1.

of the mother.[67] It has been held, under a statute giving a right of action to children, that a child born after the death of a father may sue.[67] Many of the statutes provide that the father may sue, or if the father be dead, the mother may sue for the death of a minor child.[68] Generally the provisions of the statutes are that the action shall be brought by the personal representatives[69] of the deceased person in cases of adults, but in some others the right to sue is vested in the widow,[70] or husband.[71] Some of the statutes provide that the remedy shall be by indictment, but even when by indictment the proceeding is treated as a civil one.[72] Some of the statutes give a right of action in favor of a

[67] Texas &c. R. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. 929; Nelson v. Galveston &c R. Co., 78 Tex. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. 81. As to suits by children, see Barker v. Hannibal &c. R. Co., 91 Mo. 86, 14 S. W. 280, and note in 70 Am. St. 674, 675.

[68] Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145; Gulf &c. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592; Kerr v. Pennsylvania R. Co., 169 Pa. St. 95, 32 Atl. 96; Illinois &c. R. Co. v. Hunter, 70 Miss. 471, 12 So. 482. See also where mother and father were divorced. Clark v. Detroit &c. R. Co., 197 Mich. 489, 163 N. W. 964, L. R. A. 1917F, 851. Under the Oklahoma statute where a minor leaves no issue or wife, but leaves both father and mother, they are his heirs and next of kin who should sue. Cowan v. Atchison &c. Ry. Co. (Okla.), 168 Pac. 1015, L. R. A. 1918B, 1141.

[69] This means the administrator or executor. Schleiger v. Northern Term. Co., 43 Ore. 4, 72 Pac. 324; Weidner v. Rankin, 26 Ohio St. 522; Usher v. West Jersey R. Co., 126 Pa. St. 206, 4 L. R. A. 261 and note, 12 Am. St. 863; Goodwin v. Nickerson, 17 R. I. 478; Kramer v. Market St. R. Co., 25 Cal. 434.

[70] McDonald v. McDonald, 96 Ky. 209, 28 S. W. 482, 49 Am. St. 289; Wright v. Woods, 96 Ky. 56, 27 S. W. 979; Canadian &c. R. Co. v. Robinson, 19 Can. S. C. 292. Mere separation from husband may not prevent recovery for his death. Wood v. Philadelphia &c. R. Co., 24 Del. 336, 76 Atl. 613; Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740. But see in case of divorce, Clark v. Kansas City &c. R. Co., 153 Mo. App. 689, 135 S. W. 979.

[71] Ferguson v. Washington &c. R. Co. (D. C. App.), 23 Wash. L. R. 407.

[72] State v. Grand Trunk &c. R. Co., 58 Maine 176, 4 Am. Rep. 258; State v. Grand Trunk &c. R. Co., 60 Maine 145; Baltimore &c. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Commonwealth v. East Boston &c. Co., 13 Allen (Mass.) 589; Commonwealth v. Sanford, 12 Gray (Mass.) 174; Commonwealth v. Boston &c. R. Co., 121 Mass. 36;

person who was dependent upon the person whose death was caused by the wrongful act of another, and in such cases the right to sue turns upon the solution of the question whether the plaintiff was dependent upon the deceased, the general rule being that if the plaintiff received any material aid from the deceased, and there is such kinship as entitles him or her to such aid, there is a right to sue.[73] A wife who leaves her husband and becomes an inmate of a brothel is not entitled to the benefit of the statute,[74] but it has been held that the fact that she was not living with her husband will not defeat a recovery.[75] Where the

Commonwealth v. Boston &c. Co., 133 Mass. 383; Commonwealth v. Boston &c. R. Co., 134 Mass. 211; State v. Manchester &c. R. Co., 52 N. H. 528.

[73] St. Louis &c. R. Co. v. Henson, 58 Fed. 531; Duval v. Hunt, 34 Fla. 85, 15 So. 876; Smith v. East &c. R. Co., 84 Ga. 183, 10 S. E. 602; Clay v. Central R. Co., 84 Ga. 345, 10 S. E. 967, 42 Am. & Eng. R. Cas. 76; Richmond &c. R. Co. v. Johnston, 89 Ga. 560, 15 S. E. 908; Augusta &c. R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Baltimore &c. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Schnatz v. Philadelphia &c. R. Co., 160 Pa. St. 602, 28 Atl. 952; Gulf &c. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592. See Petrie v. Columbia &c. R. Co., 29 S. Car. 303, 7 S. E. 515; Howard v. Delaware &c. Co., 40 Fed. 195, 41 Am. & Eng. R. Cas. 473, 6 L. R. A. 75; Chicago &c. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Daly v. New Jersey &c. Co., 155 Mass. 1, 29 N. E. 507; Hodnett v. Boston &c. R. Co., 156 Mass. 86, 30 N. E. 224; St. Louis &c. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104; San Antonio &c. R. Co. v. Long, 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 637, 47 Am. St. 87, Even an adult child may be dependent. Hollingsworth v. Davis &c. Copper Co., 38 Mont. 143, 99 Pac. 142; Missouri &c. R. Co. v. Butts, 62 Tex. Civ. App. 539, 132 S. W. 88. But where the deceased did not contribute to support of the claimant, and was under no legal obligation to do so, the latter was held not to be dependent on the deceased although he may have been under moral obligation to support the claimant. Pinel v. Rapid Ry. System, 184 Mich. 169, 150 N. W. 897. Married children not legally entitled to support from deceased are held not entitled to sue under Michigan statute. Ormsbee v. Grand Trunk &c. R. Co., 197 Mich. 576, 164 N. W. 408.

[74] Fort Worth &c. R. Co. v. Floyd (Tex. Civ. App.), 21 S. W. 544.

[75] Dallas &c. R. Co. v. Spicker, 61 Tex. 427, 48 Am. Rep. 297; Galveston &c. R. Co. v. Murray (Tex. Civ. App.), 99 S. W. 144. See also to same effect, Wood v. Philadelphia &c. R. Co., 24 Del. 336, 76 Atl. 613.

right of action is given to a minor child, the general rule is that a guardian cannot maintain an action.[76]

§ 2057 (1369). What must be shown to constitute a cause of action.—We shall not undertake to state in detail what must be shown in order to constitute a cause of action under the statutes, but will state in outline what facts are generally regarded as essential to give a right of recovery. The general rule is that the plaintiff must show that the death of the decedent was caused by the wrongful act of the defendant, and in actions against railroad companies this ordinarily depends upon whether there was or was not negligence on the part of the company or its employes, the rule being, in the absence of statutory provisions to the contrary, that the burden is on the plaintiff to affirmatively prove the negligence of the defendant and that such negligence was the proximate cause of the injury.[77] To establish negligence there must be evidence of an actionable breach of duty.[78] In many jurisdictions, as we have elsewhere shown, the burden is on the plaintiff upon the question of the contributory negligence, but in many others it is on the defendant. The death must be shown to have been caused by the wrongful act of the defendant.[79] It has been held that where a person already mortally

[76] Louisville &c. R. Co. v. Goody-Koontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. 371 and note.

[77] Hanley v. West Virginia Cent. &c. R. Co., 59 W. Va. 419, 53 S. E. 625; Merrihew v. Chicago &c. R. Co., 92 Ill. App. 346; Indiana Union Trac. Co. v. Love, 180 Ind. 442, 99 N. E. 1005; United Elec. Light &c. Co. v. State, 100 Md. 634, 60 Atl. 248; Donaldson v. New York &c. R. Co., 188 Mass. 484, 74 N. E. 915.

[78] Missouri &c. R. Co. v. Moseley, 57 Fed. 921; Haley v. Chicago &c. R. Co., 21 Iowa 15; Riley v. Connecticut &c. R. Co., 135 Mass. 292. 15 Am. & Eng. R. Cas. 181; Irwin v. Alley, 158 Mass. 249. 33 N. E. 517; Chandler v. New York &c. R. Co., 159 Mass. 589, 35 N. E. 89; Jackson v. St. Louis &c. R. Co., 87 Mo. 422, 56 Am. Rep. 460. Palmer v. New York &c. R. Co., 112 N. Y. 234, 19 N. E. 678; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Norfolk &c. R. Co. v. Stegall, 105 Va. 538, 54 S. E. 19. See also Bowen v. Illinois Cent. Ry. Co., 136 Fed. 306, 70 L. R. A. 915.

[79] Daniels v. New York &c. R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751; McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435, 74 Am. St. 690; Caffrey v. Bartlett-Western Ry. Co. (Tex. Civ. App.), 198 S. W. 810. The injury complained of

wounded was injured by the negligence of another there could be no recovery, as it could not be said that death was caused by the wrongful act.[80] The question as to what may be deemed sufficient evidence that the wrong was the proximate cause of death was considered in a Tennessee case, and it was held that it was proper to instruct the jury that "if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death."[81] Where, however,

must be a proximate cause of the death. Cincinnati &c. Ry. Co. v. Perkins, 177 Ky. 88, 197 S. W. 526; Nashville v. Reese, 138 Tenn. 471, 197 S. W. 492. But it may be a proximate cause justifying a recovery even though there is some other injury or disease with which it is a concurrent cause, especially where the death would not have occurred without it. St. Louis &c. R. Co. v. Steel, 129 Ark. 520, 197 S. W. 288; Sterling &c. Coal Co. v. Strope, 130 Ark. 435, 197 S. W. 858; Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243; Rook v. Davenport &c. R. Co., 182 Iowa 227, 165 N. W. 419. See also Nicoll v. Sweet, 163 Iowa 683, 144 N. W. 615, L. R. A. 1918C, and note; also note in 48 L. R. A. (N. S.) 120.

[80] Jackson v. St. Louis &c. R. Co., 87 Mo. 422, 56 Am. Rep. 460, 25 Am. & Eng. R. Cas. 327. But it is well settled that a recovery may be had for the aggravation of existing injuries. Louisville &c. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389; Allison v. Chicago &c. R. Co., 42 Iowa 274; Quackenbush v. Chicago &c. R. Co., 73 Iowa 458, 35 N. W. 523; Lapleine v. Morgan's &c. Co., 40 La. Ann. 661, 1 L. R. A. 378; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Baltimore &c. R. Co. v. Kemp, 61 Md. 74; Mobile &c. R. Co. v. McArthur, 43 Miss. 180; Barbee v. Reese, 60 Miss. 906; Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622; Dickson v. Hollister, 123 Pa. St. 421, 16 Atl. 484, 10 Am. St. 533; Driess v. Frederich, 73 Tex. 460, 11 S. W. 493; Stewart v. Ripon, 38 Wis. 584; Fitzpatrick v. Great Western &c. R. Co., 12 U. C. Q. B. 645. See Beauchamp v. Saginaw &c. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Pullman &c. Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89. See also Meekins v. Norfolk &c. R. Co., 134 N. Car. 217, 46 S. E. 493; Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851. But where there is an existing injury there can only be a recovery for the aggravation caused by the wrong of the defendant. Whelan v. New York &c. R. Co., 38 Fed. 15; Bray v. Latham, 81 Ga. 640, 8 S. E. 64; Robinson v. Waupaca, 77 Wis. 544, 46 N. W. 809; note in 48 L. R. A. (N. S.) 121.

[81] Louisville &c. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268. See also Kansas City &c. R. Co. v. Matthews, 142

the injured person was ill or wounded prior to the infliction of the wrong by the defendant, that fact must exert an important influence upon the question of the amount of the recovery, especially in jurisdictions where only compensatory damages can be awarded for pecuniary loss. There must be evidence of the existence of persons designated by the statute as beneficiaries, and in some states evidence that there were persons dependent upon the decedent for support.[82]

§ 2058 (1370). Year and a day.—The rule which prevails at common law that in order to sustain a prosecution for the killing of a human being death must occur within "a year and a day" does not apply to statutes providing for the recovery of damages in cases where death is caused by a wrongful act.[83] In the case

Ala. 298, 39 So. 207; Louisville &c. R. Co. v. Chamblee, 171 Ala. 188, 54 So. 681, Ann. Cas. 1913A, 977; Herke v. St. Louis &c. R. Co., 141 Mo. App. 613, 125 S. W. 822.

[82] Railroad Co. v. Barron, 5 Wall. (U. S.) 90, 106, 18 L. ed. 591; Daly v. New Jersey &c. R. Co., 155 Mass. 1, 29 N. E. 507; Hodnett v. Boston &c. R. Co., 156 Mass. 86, 30 N. E. 224; Barnum v. Chicago &c. R. Co., 30 Minn. 461, 16 N. W. 364; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526; Loague v. Railroad, 91 Tenn. 458, 19 S. W. 430; ante, §§ 2045, 2055. See generally Miller v. Southwestern R. Co., 55 Ga. 143; Kansas &c. R. Co. v. Miller, 2 Colo. 442; Chicago &c. R. Co. v. Morris, 26 Ill. 400; Serensen v. Northern Pac. R. Co., 45 Fed. 407; Grotenkemper v. Harris, 25 Ohio St. 510. But see under a Massachusetts statute, Johnston v. Bay State Street R. Co., 222 Mass. 583, 111 N. E. 391, L. R. A. 1918A, 650.

[83] Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. ed. 422. The court reviewed the cases of Pittsburgh &c. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; Hanna v. Jeffersonville &c. R. Co., 32 Ind. 113; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Burns v. Grand Rapids &c. R. Co., 113 Ind. 169, 15 N. E. 230, and Hecht v. Ohio &c. R. Co., 132 Ind. 507, 32 N. E. 302; Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Rep. 271, and held that: "The right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent to have maintained an action on account of such act or omission." See Schlichting v. Wintgen, 25 Hun (N. Y.) 626. See also Western &c. R. Co. v. Bass, 104 Ga. 390, 30 S. E. 874.

referred to the court considered the English authorities, and declared that, while applicable to criminal prosecutions, they were wholly inapplicable to civil proceedings. The reasoning of the court is well sustained and seems to us to justly apply to all statutes giving a right of action in cases of death by wrongful act, and not to be confined to the statute of Indiana.

§ 2059 (1371). Actions for injuries causing death are transitory.—Actions for injuries causing death are transitory and not local. They may be brought against railroad companies in any county where the law provides for suing such companies and where service of summons can be effectively made, or, in cases where the statute permits and the company is a non-resident, where property can be seized under a writ of attachment, but in the latter class of cases no personal judgment can be obtained against the company unless by appearance or in some other mode it submits its person to the jurisdiction of the court out of which the attachment issues. The federal courts may take jurisdiction in a proper case either by original action therein or by removal from the state court in the proper case.[84] A foreign administrator

[84] Railway Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571, citing Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Steamboat Co. v. Chase, 16 Wall. (U. S.) 522, 21 L. ed. 369; Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439. See also White v. Chicago &c. R. Co. (Ky.), 96 S. W. 911. In Lung Chung v. Northern &c. R. Co., 19 Fed. 254, it was held that the cause of action arose at the place of death and not where letters of administration were granted. It was held that the case of Goff v. Norfolk &c. R. Co., 36 Fed. 299, that the fact that the administrator was selected in order to give the federal court jurisdiction does not affect the question. Harper v. Norfolk R. Co., 36 Fed. 102. The case last cited is wrong upon the question of pleading. Serensen v. Northern &c. R. Co., 45 Fed. 407. The provisions of a state statute excluding the jurisdiction of the federal courts are held to be invalid. Railway Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Union Bank of Tenn. v. Jolly, 18 How. (U. S.) 503. 15 L. ed. 472; Hyde v. Stone, 20 How. (U. S.) 170, 15 L. ed. 874; Payne v. Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Dennistoun v. Draper, 5 Blatch. (U. S.) 336; Kern v. Huidekoper, 103 U. S. 485, 492, 26 L. ed. 354; Barron v. Burnsides, 121 U. S. 186, 7 Sup. Ct. 931, 30 L.

cannot sue in a federal court for the recovery of damages for causing death under a state statute which authorizes foreign administrators to sue for the recovery of "debts due their decedent."[85] In one of the reported cases it was held that in transitory actions the general rule is that the action may be brought wherever the wrongdoer can be found, and under this rule it was decided that an action will lie in Texas for injuries received in Kansas, although neither of the parties is a resident of Texas.[86]

§ 2060 (1372). Actions by administrators and executors.—The general theory of the statutes granting a right to personal representatives to sue is that the action is for the benefit of the persons designated, that the amount recovered does not become assets of the decedent's estate, and that the personal representative is a mere conduit for the transmission of the amount recovered.[87] It follows from this general doctrine that there must

ed. 915; Southern &c. R. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; Bigelow v. Nickerson, 70 Fed. 113, 30 L. R. A. 336. The case last cited contains a valuable collection of cases upon the subject of injuries on navigable waters. See also to the effect that the action is transitory, Burns v. Grand Rapids &c. R. Co., 113 Ind. 169, 172, 15 N. E. 230; Louisville &c. R. v. Cooley (Ky.), 49 S. W. 1372; Drea v. Carrington, 32 Ohio St. 595; Austin v. Cameron, 83 Tex. 351, 18 S. W. 437.

[85] Maysville &c. Co. v. Marvin, 59 Fed. 91, reversing Marvin v. Maysville &c. R. Co., 49 Fed. 436, citing Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. ed. 757; Louisville &c. R. Co. v. Case, 9 Bush (Ky.) 728; Louisville &c. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. 563. See also Courtney v. Pratt, 135 Fed. 818, 820.

[86] Missouri &c. R. Co. v. Thompson, 11 Tex. Civ. App. 658, 33 S. W. 718. And see further to the effect that the action is transitory. Hall v. Louisville &c. R. Co., 157 Fed. 464; Kansas City &c. R. Co. v. McGinty, 76 Ark. 356, 88 S. W. 1001; Husted v. Missouri Pac. R. Co., 143 Mo. App. 623, 128 S. W. 282.

[87] St. Louis &c. R. Co. v. Needham, 52 Fed. 371; Western Union Tel. Co. v. McGill, 57 Fed. 699, 21 L. R. A. 818; Chicago &c. R. Co. v. Morris, 26 Ill. 400; Baltimore &c. R. Co. v. Then, 159 Ill. 535, 42 N. E. 971; Jeffersonville &c. R. Co. v. Swayne, 26 Ind. 477; Perry v. St. Joseph &c. R. Co., 29 Kans. 420; Union &c. R. Co. v. Dunden, 37 Kans. 1, 14 Pac. 501; Commonwealth v. Eastern R. Co., 5 Gray (Mass.) 473; State v. Gilmore, 24 N. H. 461; Gottlieb v. North Jersey St. R. Co., 72 N. J. L. 480, 63 Atl. 339; Lucus v. New York &c. R. Co., 21 Barb. (N. Y.) 245; Dick-

be beneficiaries such as the statute designates. Where provision is made for a specified class of persons only the persons designated are entitled to the avails of the recovery.[88] Many of the statutes give a right of action to personal representatives for the benefit of the "next of kin," and there is some diversity of opinion as to who can be regarded as the "next of kin."[89] Whether a foreign administrator can maintain the action depends upon the provisions of the statute, but the views of the courts as to the construction the statute should receive are not harmonious. We

ins v. New York &c. R. Co., 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389; Johnston v. Cleveland &c. R. Co., 7 Ohio St. 336; Woodard v. Michigan &c. R. Co., 10 Ohio St. 121; Trafford v. Adams Exp. Co., 8 Lea (Tenn.) 96, 111; Blake v. Midland &c. R. Co., 10 Eng. Law & Eq. 437; Duckworth v. Johnson, 4 Hurl. & N. 653.

[88] See cases cited in preceding note. See also ante, § 2045. As elsewhere said the action can only be maintained by the person or persons authorized by statute. See also Berry v. Louisville &c. R. Co., 128 Ind. 484, 24 N. E. 182; "Alaska, The," 130 U. S. 201, 9 Sup. Ct. 461, 32 L. ed. 923; Frazier v. Georgia &c. R. Co., 96 Ga. 785, 22 S. E. 936. If next of kin, who are not beneficiaries within the statute are named and shown, and their damages are more than the damages of the real beneficiaries, the existence of such real beneficiaries and amount of damages sustained by them may be shown in defense. Smith v. Cleveland &c. Ry. Co., 67 Ind. App. 397, 117 N. E. 534.

[89] In Western Union Tel. Co. v. McGill, 57 Fed. 699, 21 L. R. A. 818, it was held, reversing the judgment of the circuit court, that a widower is not entitled to share as a beneficiary under a statute providing that the recovery should be for the exclusive benefit of the widow and children, if any, or the next of kin. It is held by some of the courts that the husband is included within the term "next of kin." Steel v. Kurtz, 28 Ohio St. 191; East Tennessee &c. R. Co. v. Lilly, 90 Tenn. 563, 18 S. W. 243; Bream v. Brown, 5 Cold. (Tenn.) 168; Trafford v. Adams Express Co., 8 Lea (Tenn.) 96; Atchison &c. R. Co. v. Townsend, 71 Kans. 524, 81 Pac. 205. Other courts hold a different doctrine. Dickins v. New York &c. R. Co., 23 N. Y. 158; Warren v. Englehart, 13 Nebr. 283, 13 N. W. 401, citing Woodward v. Chicago &c. R. Co., 23 Wis. 400; Commonwealth v. Boston &c. R. Co., 11 Cush. (Mass.) 512; Safford v. Drew, 3 Duer (N. Y.) 627; Indianapolis &c. R. Co. v. Keely, 23 Ind. 133. But see Drake v. Gilmore, 52 N. Y. 389. See generally the note in 70 Am. St. 673, et seq.; L. T. Dickason Coal &c. Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411; Charlton v. St. Louis &c. R. Co., 200 Mo. 413, 98 S. W. 529; Gottlieb v. North Jersey St. R. Co., 72 N. J. L. 480, 63 Atl. 339; Joplin &c. R. Co. v. Payne, 194 Fed. 387.

refer to some of the decided cases without criticism or comment.[90] It may be said, however, that in most jurisdictions a foreign administrator may maintain the action if he is given the right by the statute of the foreign state enforced where the action is brought, and, indeed, it is also the general rule that no other person than the one designated by such statute can maintain the action.[91]

§ 2061 (1373). Limitations—Time within which action must be brought.—Where the injury is received in the state where the action is brought it is, of course, governed by the statute of limitations of that state. The action, if not brought within the time limited, cannot be maintained if the proper defense is interposed.[92] Where the injury is received in one state and the action

[90] Hulbert v. Topeka, 34 Fed. 510; Maysville &c. R. Co. v. Marvin, 59 Fed. 91 (reversing Marvin v. Maysville &c. R. Co., 49 Fed. 436); Alabama &c. Co. v. Griffin, 149 Ala. 423, 42 So. 1034; Stewart v. Baltimore &c. R. Co., 6 App. Cas. (D. C.) 56, 23 Wash. L. 247; Southwestern &c. R. Co. v. Paulk, 24 Ga. 356; Union &c. R. Co. v. Shacklett, 119 Ill. 232, 10 N. E. 896; Wabash &c. R. Co. v. Shacklett, 10 Ill. App. 404; Jeffersonville &c. R. Co. v. Hendricks, 26 Ind. 228; Kansas &c. R. Co. v. Cutter, 16 Kans. 568; Limekiller v. Hannibal &c. R. Co., 33 Kans. 83, 5 Pac. 401, 52 Am. Rep. 523; Brown v. Louisville &c. R. Co., 97 Ky. 228, 30 S. W. 639; Richardson v. New York &c. R. Co., 98 Mass. 85, 91; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

[91] Erickson v. Pacific &c. Co., 96 Fed. 80; Cincinnati &c. R. Co. v. Thieband, 114 Fed. 918; Denver &c. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Fabel v. Cleveland &c. Ry. Co., 30 Ind. App. 268, 65 N. E. 929; Hyde v. Wabash &c. R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820; Oates v. Union Pac. R. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. 348; Missouri Pac. R. Co. v. Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67 and note; Wooden v. Western &c. R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. 803, 13 L. R. A. 458. See also Usher v. West Jersey R. Co., 126 Pa. St. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. 863; Stewart v. Baltimore &c. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537; Lower v. Segal, 59 N. J. L. 66, 34 Atl. 945; Memphis &c. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527.

[92] It is generally held that as the time within which the action is brought is part of the right the objection that it is not brought within the time limited need not be presented by plea or answer. See authorities cited in the notes to

is brought in another it would seem that there would be difficulty in solving the question as to what statute governs, that of the forum or that of the place where the injury was received, but upon that question the authorities are well agreed. The federal courts hold that the statute of the place where the injury was received governs,[93] and the same doctrine is laid down by other courts.[94] The theory is that the limitation inheres in the right itself, and it is only on this theory that the doctrine can be supported, for ordinarily the limitation of actions pertains to the remedy rather than the primary right.[95] In a recent case brought

this section. See also Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48. In Georgia v. Chicago &c. R. Co., 51 Wis. 603, 8 N. W. 374, it is held that a complaint which shows that the action was not brought within the time limited is bad on demurrer. The court cited Howell v. Howell, 15 Wis. 55.

[93] Theroux v. Northern Pac. R. Co., 64 Fed. 84; Boyd v. Clark, 8 Fed. 849; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358; Munos v. Southern &c. R. Co., 51 Fed. 188; International &c. Co. v. Lindstrom, 123 Fed. 475.

[94] Benjamin v. Eldridge, 50 Cal. 612; Weaver v. Baltimore &c. R. Co., 1 Mackey (21 D. C.) 499; O'Shields v. Georgia &c. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; Hanna v. Jeffersonville &c. R. Co., 32 Ind. 113; Hamilton v. Hannibal &c. R. Co., 39 Kans. 56, 18 Pac. 57; Eastwood v. Kennedy, 44 Md. 563; Cavanaugh v. Ocean &c. Co., 19 Civ. Proc. 391, 13 N. Y. S. 540; Bonnell v. Jewett, 24 Hun (N. Y.) 524; Taylor v. Cranberry &c. Co., 94 N. Car. 525; Best v. Kinston, 106 N. Car. 205, 10 S. E. 997; Pittsburgh &c. R. Co. v. Hine, 25 Ohio St. 629; Hill v. New Haven, 37 Vt. 501. See Selma &c. R. Co. v. Lacey, 49 Ga. 106; Louisville &c. Co. v. Sanders, 86 Ky. 259, 5 S. W. 563; Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662; Nelson v. Galveston &c. R. Co., 78 Tex. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. 81; Conger v. Grand Trunk &c. R. Co., 13 Ont. 160; Zimmer v. Grand Trunk &c. R. Co., 19 Ont. App. 693; North Shore &c. R. Co. v. McWillie, 17 Can. Sup. Ct. 511.

[95] Johnston v. Canadian &c. R. Co., 50 Fed. 886; Williams v. St. Louis &c. R. Co., 123 Mo. 573, 27 S. W. 387; Munos v. Southern &c. R. Co., 51 Fed. 188. In the last case just cited the distinction is drawn as to cases where there is no special statute affecting such actions in the state where the injury was inflicted and it is held that the statute of limitations of the state where the action is brought governs in such a case. In Gulf &c. R. Co. v. Bradley, 110 Miss. 152, 69 So. 666, Ann. Cas. 1918D, 554, it is held the limitation in the statute inhered in the right and was a limitation of the liabili-

in a federal court in New Jersey the complaint did not show where the cause of action arose, but averred that the plaintiff was given a right of action under the laws of New Jersey while an answer averred that it arose in Vermont. The Vermont statute provides that the action must be commenced within two years from the death and the New Jersey statute provides that it must be commenced within "twenty-four calendar months" after the death. An amendment to the complaint was filed after such time had expired, proceeding on the theory that the cause of action was given by the laws of Vermont and setting up the Vermont statute. The court held that as judicial knowledge would be taken of the laws of the several states the averment in the original complaint as to the New Jersey law was mere surplusage and the amendment did not state a new cause of action barred by the statute of limitations.[96] It is held that, where the right is fully barred by the statute of limitations during the life of the decedent, no action can be maintained after his death by his personal representatives,[97] and this is in harmony with the doctrine that a recovery by the decedent in his lifetime bars his representatives.[98] But, under some statutes giving an independ-

ty and not merely the remedy and where the limitation of the statute had run it was not extended or revived by an amendment to the statute extending the time.

[96] Williams v. William Scaife & Sons Co., 227 Fed. 293, citing Missouri &c. Ry. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134, and distinguishing Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983.

[97] Canadian &c. R. Co. v. Robinson, 19 Can. Sup. Ct. 292, 54 Am. & Eng. R. Cas. 49; Williams v. Murray Docks &c. (1905), 1 K. B. 804, 74 L. J. K. B. N. S. 481; Kelliher v. New York &c. R. Co., 212 N. Y. 207, 105 N. E. 824, L. R. A. 1915E, 1179; Williams v. Alabama &c. R. Co., 158 Ala. 396, 48 So. 487, 17 Ann. Cas. 516.

[98] Post, § 2063. In Canadian v. Robinson, 19 Can. Sup. Ct. 292, 54 Am. & Eng. R. Cas. 49, Taschereau J. said: "And one of these rules, I would say today an uncontroverted one—is that under the act the widow or other relatives therein mentioned have no action if at the time of his death the deceased had none." The cases of Read v. Great Eastern &c. R. Co., L. R. 3 Q. B. 555; Haigh v. Royal Mail &c. Co., 52 L. J. Q. B. 640; Armsworth v. Southeastern R. Co., 11 Juris. 758; Tucker v. Chaplin, 2 C. & K. 730; Boulter v. Webster, 11 L. T. N. S. 598; Griffiths v. Earl of Dudley, L R. 9 Q. B. D. 357.

ent right of action for death, it is held that the statute begins to run only from the death and that it makes no difference whether an action by the injured person for his own injuries was barred before his death or not.[99]

§ 2062 (1374). Statutes do not deny the right to rely upon the defense of contributory negligence.—The creation of the right to maintain an action for the recovery of damages for causing the death of another does not deprive the defendant of the defense of contributory negligence.[1] In many jurisdictions the plaintiff cannot recover unless he affirmatively proves that the negligence of the deceased person did not proximately contribute to the injury,[2] and we suppose that in no case does the mere creation

[99] German American Trust Co. v. Lafayette Box &c. Co., 52 Ind. App. 211, 98 N. E. 874. See also Donnelly v. Chicago &c. R. Co., 163 Ill. App. 7; Causey v. Seaboard &c. R. Co., 166 N. Car. 5, 81 S. E. 917, L. R. A. 1915E, 1185, Ann. Cas. 1916C, 707n; Hoover v. Chesapeake &c. R. Co., 46 W. Va. 268, 33 S. E. 224; Nestelle v. Northern Pac. R. Co., 56 Fed. 261; Western Un. Tel. Co. v. Preston, 254 Fed. 229.

[1] In Passamaneck v. Louisville R. Co., 98 Ky. 195, 32 S. W. 620, it was held that the provision of the Kentucky constitution did not exclude the defense of contributory negligence. The English rule is that the defense still exists under the statute. Senior v. Ward, 1 E. & E. 385; Canadian Pacific R. Co. v. Robinson, 19 Can. Sup. Ct. 292, 54 Am. & Eng. R. Cas. 49. Contributory negligence of the person killed is fatal, and, if an employe, the fellow-servant doctrine has been held to apply. State v. Manchester &c. R., 52 N. H. 528; State v. Maine Cent. R. Co., 60 Maine 490; Linck v. Louisville &c. R. Co., 107 Ky. 370. 54 S. W. 184; Dacey v. Old Colony R. Co., 153 Mass. 112, 26 N. E. 437. Numerous cases cited in the chapter on "Fellow Servants" also support this proposition.

[2] See generally as to the effect of contributory negligence. Seats v. Georgia &c. R. Co., 86 Ga. 811, 13 S. E. 88; Holland v. Tennessee &c. R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232; Little Rock &c. R. Co. v. Cavenesse, 48 Ark. 106, 2 S. W. 505; Jackson v. Crilly, 16 Colo. 103. 26 Pac. 331; Abend v. Terre Haute &c. R. Co., 111 Ill. 202, 53 Am. Rep. 616 and note; Illinois Cent. R. Co. v. Cozby, 174 Ill. 109, 50 N. E. 1011; Evansville &c. R. Co. v. Lowdermilk, 15 Ind. 120; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Baltimore &c. R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528; Walsh v. Boston &c. R. Co., 171 Mass. 52., 50 N. E. 453; Michigan &c. R. Co. v. Campau, 35 Mich. 468; Carney

of the right to maintain an action abrogate or change the ordinary rules of pleading and evidence, and that unless the defense of contributory negligence is clearly excluded it exists, as at common law.[3] The rule that the defense of contributory negligence is not taken away in any case, unless the statute clearly so provides, is a general rule applicable to all classes of actions in which, at common law, the defense of contributory negligence was a valid and effective one, for the settled doctrine is that the rules of the common law are not abrogated except in cases where the intention to abrogate them is clearly manifested.[4] And it has

v. Chicago &c. R. Co., 46 Minn. 220, 48 N. W. 912; Fulmer v. Illinois &c. R. Co., 68 Miss. 355, 8 So. 517; Karle v. Kansas City &c. R. Co., 55 Mo. 476; Hamilton v. Delaware &c. R. Co., 50 N. J. 263, 13 Atl. 29; Wilds v. Hudson River R. Co., 29 N. Y. 315; Price v. Richmond &c. R. Co., 33 S. Car. 556, 12 S. E. 413, 26 Am. St. 700; Baltimore &c. R. Co. v. Sherman, 30 Grat. (Va.) 602; Tucker v. Chaplin, 2 Car. & K. 730; Senior v. Ward, 1 El. & El. 385; 3 Elliott Ev. § 2011. And see generally to the effect that contributory of the deceased to the beneficiary may defeat recovery. Weatherly v. Nashville &c. R. Co., 166 Ala. 575, 51 So. 959; Pittsburgh &c. R. Co. v. Rogers, 45 Ind. App. 230, 87 N. E. 28; Brown v. West Riverside Coal Co., 143 Iowa 662, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; Lundergan v. New York &c. R. Co., 203 Mass. 460, 89 N. E. 625; Feldman v. Detroit United Ry., 162 Mich. 486, 127 N. W. 687; Vinnette v. Northern Pac. R. Co., 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328. But compare where statute is penal, Jones v. Boston &c. R. Co., 205 Mass. 108, 90 N. E. 1152; Renaud v. New York &c. R. Co., 210 Mass. 553, 97 N. E. 98, 38 L. R. A. (N. S.) 689.

[3] Noyes v. Southern &c. R. Co. (Cal.), 24 Pac. 927; Quinn v. New York &c. R. Co., 56 Conn. 44, 12 Atl. 97, 7 Am. St. 284; Rowland v. Cannon, 35 Ga. 105; Newman v. Chicago &c. R. Co., 80 Iowa 672, 45 N. W. 1054; Murray v. Pontchartrain R. Co., 31 La. Ann. 490; Pennsylvania &c. R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. 561; Helfrich v. Ogden &c. R. Co., 7 Utah 186, 26 Pac. 295; Nashville &c. R. Co. v. Smith, 6 Heisk. (Tenn.) 174; ante, § 1882. See also Florida East Coast R. Co. v. Fredcritzi, 77 Fla. 150, 81 So. 104. But there are some statutes giving a cause or right of action for death, such, for instance, as the Federal Employers' Liability Act, that expressly or clearly abrogate such a defense either in whole or in part.

[4] See ante, § 1882; Lake Erie &c. R. Co. v. Craig, 73 Fed. 642, citing Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886; Cincinnati &c. R. Co. v. Van Horne, 69 Fed. 139. In Lake Erie &c. R. Co. v. Craig, supra, the statute provided that the

been held that the defense of contributory negligence goes to the right of action rather than the remedy, and that if good in the state in which the death was caused it is good in another state in which the action is brought.[5]

§ 2063 (1375). **One recovery merges cause of action.**—Where the deceased in his lifetime brings an action and recovers damages for the injury sustained, the general rule under most of the statutes is that his representatives cannot maintain an action for damages where death results from the same injury for which the recovery was had.[6] The wrongful injury and the damages con-

failure of a railroad company to block frogs should subject it to punishment and it was held that the statute did not exclude the defense of contributory negligence. The case of Cincinnati &c. R. Co. v. Van Horne, supra, does not touch upon the question of contributory negligence, but holds that the failure to obey the statute constitutes negligence on the part of the railroad company.

[5] Morisette v. Canadian Pac. Ry. Co., 76 Vt. 267, 56 Atl. 1102. But it is held that the burden of proving contributory negligence is on the defendant in the federal courts and that this rule governs in such a court no matter what the state rule is. Baker v. Philadelphia &c. R. Co., 149 Fed. 882, 887.

[6] Holton v. Daly, 106 Ill. 131; Chicago &c. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263 (but see Ohnesorge v. Chicago &c. R. Co., 250 Ill. 424, 102 N. E. 819); Hecht v. Ohio &c. R. Co., 132 Ind. 507, 32 N. E. 302 (approved in Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851; and followed in Golding v. Knox, 56 Ind. App. 149, 104 N. E. 978); McCarthy v. Chicago &c. R. Co., 18 Kans. 46, 26 Am. Rep. 742; Louisville &c. R. Co. v. McElwain, 18 Ky. L. 379, 34 S. W. 236. In the case last cited it was said that, "It was not the intention of the legislature to multiply actions," and the cases of Hansford v. Payne, 11 Bush. (Ky.), 380; and Conner v. Paul, 12 Bush. (Ky.) 144, were reviewed; Hamel v. Southern R. Co., 108 Miss. 172, 66 So. 809; Littlewood v. Mayor, 89 N. Y. 547; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; Putnam v. Southern Pac. Co., 21 Ore. 230, 27 Pac. 1033; Fowlkes v. Nashville &c. R. Co., 9 Heisk. (Tenn.) 829; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016 (disapproving Needham v. Grand Trunk &c. R. Co., 38 Vt. 294); Read v. Great Eastern &c. R. Co., L R. 3 Q. B. 555; Griffiths v. Dudley, L. R. 9 Q. B. D. 357; Haigh v. Royal &c. Co., 52 L. J. (N. S.) Q. B. D. 640; Wood v. Gray (1892), A. C. 67 L. T. N. S. 628. See also Berned v. Whittelsey, 93 Kans. 769, 145 Pac. 567, Ann. Cas. 1916D, 350; Louisville &c. R. Co. v. Raymonds' Admr., 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176 and note.

stitute the right of action, and if there is a judgment the right is therein merged, for the same injury cannot be split into fragments. "While the action relates to the remedy it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law, and so it should be strictly construed. A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible." It seems clear to us that under the ordinary statute there can only be one recovery, and that a recovery adjudicates the whole right.[7] A different rule may prevail in jurisdictions where rights are severed and concurrent actions given by clear and unequivocal statutory provisions,[8] but this can only be true where

But compare Leggott v. Great Northern &c. R. Co., L. R. 1. Q. B. D. 599; Hulbert v. Topeka, 34 Fed. 510; Hurst v. Detroit &c. R. Co., 84 Mich. 539, 48 N. W. 44; Rowe v. Richards, 35 S. Dak. 201, 151 N. W. 1001, L. R. A. 1915E, 1075n, Ann. Cas. 1918A, 294.

[7] Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797 and note. In the case cited, and from which we have quoted, there is an able discussion of the question and an excellent review of the authorities. See also note to Thompson v. Ft. Worth &c. R. Co., 97 Tex. 590, 80 S. W. 990, in 1 Ann. Cas. 231.

[8] Hedrick v. Ilwaco &c. R. Co., 4 Wash. 400, 30 Pac. 714. See also Clare v. New York &c. R. Co., 172 Mass. 211, 51 N. E. 1083; Nelson v. Galveston &c. R. Co., 78 Tex. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. 81. The court in the first case cited placed its decision in great part upon the case of Walters v. Chicago &c. R. Co., 36 Iowa 458. In Hartigan v. Southern &c. R. Co., 86 Cal. 142, 24 Pac. 851, it was held that under a statute providing that the action may be brought by the heirs or by the personal representative a judgment in an action by the former would merge the right of action. In Munro v. Pacific &c. Co., 84 Cal. 515, 34 Pac. 303, 305, 18 Am. St. 248, the court quoted from the opinion in Blake v. Midland R. Co., 18 Q. B. 93, the statement that the statute "gives to the representative a totally new right," and cited approvingly Franklin v. Southeastern R. Co., 3 Hurl. & N. 211; Dalton v. Southeastern R. Co., 4 C. B. (N. S.) 296; Bradshaw v. Lancashire &c. R. Co., L. R. 10 C. P. 189; Leggott v. Great Northern R. Co., L. R. 1 Q. B. D. 599; Pym v. Great Northern R. Co., 2 Best & S. 759; Safford v. Drew, 3 Duer (N. Y.) 627. See Putnam v. Southern &c. R. Co., 21 Ore. 230, 27 Pac. 1033, 44 Alb. L. J. 517; also elaborate notes on the general subject in L. R. A. 1915E, 1095-1163.

the statute makes peculiar provisions upon the subject; so peculiar, indeed, as to clearly contravene the general principles of law, and entirely exclude them from consideration.

§ 2064. When no merger—Action pending at death.—In some jurisdictions where there are both survival statutes and statutes giving an action for death it has been held that a judgment based upon one of them is not a bar to an action on the other.[9] And a mother's right to sue as heir for the negligent killing of her son under a statute for the benefit of heirs is not barred by a judgment of another state upon such statutory, liability in an action brought by an administratrix appointed under the laws of a third state, to which action the mother was not a party and in which she could not have been represented by the administratrix under the statute creating the benefit, and the fact that the mother unsuccessfully attempted to share in the proceeds in the court appointing the administratrix makes no difference.[10] The fact that the deceased in his lifetime had brought an action which was pending at the time of his death is not ordinarily a bar to an action brought after his death by his legal representative.[11]

[9] St. Louis &c. R. Co. v. Goode, 42 Okla. 784, 142 Pac. 1185, L. R. A. 1915E, 1141n; Grainger v. Greenville &c. R. Co., 101 S. Car. 399, 85 S. E. 968. And compare both principal and dissenting opinions in Rowe v. Richards, 32 S. Dak. 66, 142 N. W. 664, L. R. A. 1915E, 1069, and cases there reviewed in note on general subject. In some jurisdictions one action may be maintained on both statutes. Nashville &c. R. Co. v. Hubble, 140 Ga. 368, 78 S. E. 919, L. R. A. 1915E, 1152n.

[10] Spokane &c. R. Co. v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. ed. 1060, L. R. A. 1915F, 736.

[11] Indianapolis &c. R. Co. v. Stout, 53 Ind. 143; International &c. R. Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484. See Davis v. St. Louis &c. R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Dougherty v. New Orleans &c. Light Co., 133 La. 993, 63 So. 493; Bowes v. Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365 and note; Lhota v. Oppenheimer & Co., 247 Pa. 280, 93 Atl. 476, L. R. A. 1915E, 1102n; Brown v. Chicago &c. R. Co., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579. Compare also Mobile &c. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 124 Am. St. 679; Bolick v. Southern R. Co., 138 N. Car. 370, 50 S. E. 689; Wood v. Gray (1892), 17 C. A., 67 L. T. N. S. 628. The Indiana statute providing for survival of an action

§ 2065 (1376). **Release—Compromise.**—Where the injured person, after the accident and prior to his death, executes a valid release, his representatives cannot maintain an action.[12] This is certainly true where the statute is a mere survival statute, and it is also generally held to be the rule under most statutes of the other class, but in the case of statutes of the latter class, where they give a new right of action not dependent upon the right of the deceased to maintain an action if he had lived, it is somewhat difficult to support the rule by logical reasoning, and some judges deny it in such cases.[13] A good plea of accord and satis-

brought by one who dies pending appeal where the cause is reversed is held constitutional in Cincinnati &c. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165n, where it is also held that a release by next of kin is no bar to an action by the administrator (also considering the question of measure of damages).

[12] Price v. Richmond &c. R. Co., 33 S. Car. 556, 12 S. E. 413, 26 Am. St. 700; Dibble v. New York &c. R. Co., 25 Barb. (N. Y.) 183. See also Southern Bell &c. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694; Berner v. Whittelsey, 93 Kans. 769, 145 Pac. 567, Ann. Cas. 1916D, 350; Brown v. Chattanooga &c. R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. 666; Syhora v. Case &c. Co., 59 Minn. 130, 60 N. W. 1008; Missouri &c. R. Co. v. Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94; Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851. And compare Mooney v. Chicago, 239 Ill. 414, 88 N. E. 194; Louisville &c. R. Co. v. Raymond, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176; Melitch v. United Rys., 121 Md. 457, 88 Atl. 229, L. R. A. 1915E, 1163; Mehegan v. Boyne City &c. R. Co., 178 Mich. 694, 141 N. W. 905, L. R. A. 1915E, 1170; Lincoln v. Detroit &c. R. Co., 179 Mich. 189, 146 N. W. 405, 51 L. R. A. (N. S.) 710; St. Louis &c. R. Co. v. Hengst, 36 Tex. Civ. App. 217, 81 S. W. 832. Mr. Freeman regards the case of Price v. Richmond &c. R. Co., 33 S. Car. 556, 12 S. E. 413, 26 Am. St. 700, as in conflict with Donahue v. Drexler, 82 Ky. 157, 56 Am. Rep. 886.

[13] Strode v. St. Louis Transit Co., (Mo.), 87 S. W. 976 (but the court in banc withdrew this opinion and held otherwise, 197 Mo. 616, 95 S. W. 851); Rowe v. Richards, 35 S. Dak. 201, 151 N. W. 1001, 1008, 1010, L. R. A. 1915E, 1075, 1083, Ann. Cas. 1918A, 294 (quoting text). See also Mahoning Val. R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893. The question is well argued and the authorities on both sides are cited and reviewed in the principal and dissenting opinions in Southern Bell Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694.

faction is sufficient to bar the action.[14] There is some diversity of opinion as to whether a beneficiary can execute an effective release or whether it must be executed by the administrator, but we suppose that much depends upon the provisions of the statute involved in the particular case. It has been held that where the action must be brought by an administrator the widow, although the sole beneficiary, cannot compromise the case,[15] but in some other jurisdictions a different rule prevails.[16] Where the beneficiary is given the right to sue and is vested with the whole interest, then, as it seems to us, it is entirely clear that he may

[14] Read v. Great Eastern &c. R. Co., L. R. 3 Q. B. 555, 37 L. J. Q. B. 278; Guldager v. Rockwell, 14 Colo. 459, 34 Pac. 556. In the last named case the court directed a verdict for the defendant upon the answer of accord and satisfaction. Upon the question of directing a verdict the court cited, Trippe v. Fiske, 4 Colo. 24; Behrens v. Kansas &c. R. Co., 5 Colo. 400; Schwenke v. Union &c. R. Co., 12 Colo. 341, 21 Pac. 43; Lord v. Pueblo &c. Refining Co., 12 Colo. 390, 21 Pac. 148.

[15] Yelton v. Evansville &c. R. Co., 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158; Dowell v. Burlington &c. R. Co., 62 Iowa 629, 17 N. W. 901; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72. See also Smith v. Cleveland &c. Ry. Co. (Ind. App.), 117 N. E. 534 (widow and children and next of kin have no right to be parties and can not compromise or control action); Pittsburg &c. R. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108, L. R. A. 1918E, 273 (holding that compromise with beneficiary is no definite action by administrator under Federal Employers' Liability Act).

[16] Schmidt v. Deegan, 69 Wis. 300, 34 N. W. 83; McKeigue v. Chicago &c. R. Co., 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148n, 118 Am. St. 1038, 10 Ann. Cas. 554. In Southern Pac. R. Co. v. Tomlinson, 163 U. S. 369, 16 Sup. Ct. 1171, 41 L. ed. 193, it is held that where there is a right in one of several to sue but the amount of recovery is to be apportioned among all the party having a right to sue can not remit part of the amount, reversing Tomlinson v. Southern Pacific R. Co. (Ariz.), 33 Pac. 710, citing Houston &c. R. Co. v. Bradley, 45 Tex. 171; March v. Walker, 48 Tex. 372; Houston &c. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; Galveston &c. R. Co. v. La Gierse, 51 Tex. 189; East Line &c. R. Co. v. Culberson, 68 Tex. 664, 5 S. W. 820; St. Louis &c. R. Co. v. Needham, 52 Fed. 371, 10 U. S. App. 339. See also Christie v. Chicago &c. R. Co., 104 Iowa 707, 74 N. W. 697; Doyle v. New York &c. R. Co., 66 App. Div. 398, 72 N. Y. S. 936. But see Holden v. Nashville &c. R. Co., 92 Tenn. 141, 20 S. W. 537, 36 Am. St. 77; Greenlee v. Railroad, 5 Lea (Tenn.) 418.

make an effective compromise.[17] The question is not, as a general rule, as to the right to compromise, but as to who has the authority to make a compromise. In jurisdictions where the right to sue is vested in the personal representatives the safe course is for the administrator, acting under the approval of the court, to make the adjustment.[18] But it seems that he has a right to do so, in the absence of fraud or the like, even without submitting the matter to the court.[19] A settlement, however, by a special administrator, appointed without any petition, where a petition is jurisdictional, is a nullity and does not bind the next

[17] Western &c. R. Co. v. Strong, 52 Ga. 461; Hendricks v. Western &c. R. Co., 52 Ga. 467; Natchez &c. Co. v. Mullins, 67 Miss. 672, 7 So. 542; Stuebing v. Marshall, 10 Daly (N. Y. C. P.) 406; Greenlee v. East Tennessee &c. R. Co., 5 Lea (Tenn.) 418; Stephens v. Railway Co., 10 Lea (Tenn.) 448; Webb v. East Tennessee &c. R. Co., 88 Tenn. 119, 12 S. W. 428; Knoxville &c. R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Holder v. Nashville &c. R. Co., 92 Tenn. 141, 20 S. W. 537, 36 Am. St. 77. But see Maney v. Chicago &c. R. Co., 49 Ill. App. 105.

[18] Hulbert v. Topeka, 34 Fed. 510; South &c. R. Co. v. Sullivan, 59 Ala. 272; Hartigan v. Southern &c. R. Co., 86 Cal. 142, 24 Pac. 851; Henchey v. Chicago, 41 Ill. 136; Washington v. Louisville &c. R. Co., 34 Ill. App. 658; Rogers v. Zook, 86 Ind. 237; Natchez &c. Co. v. Mullins, 67 Miss. 672, 7 So. 542. See generally Owen v. Brockschmidt, 54 Mo. 285; McNamara v. Slavens, 76 Mo. 329. As to the effect of release upon right of beneficiary who executes it, see Davis v. St. Louis &c. R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537; Needham v. Grand Trunk &c. R. Co., 38 Vt. 294; Earl v. Tupper, 45 Vt. 275. But in Legg v. Britton, 64 Vt. 652, 24 Atl. 1016, the doctrine of the earlier Vermont cases is disapproved.

[19] Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034 (disapproving a statement in Yelton v. Evansville &c. R. Co., 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158 and note to the contrary); Foot v. Great Northern R. Co., 81 Minn. 493, 84 N. W. 342, 83 Am. St. 395, 52 L. R. A. 354; Washington v. Louisville &c. R. Co., 34 Ill. App. 658, 136 Ill. 49, 26 N. E. 653. See also Jones v. Minnesota Transfer R. Co., 108 Minn. 129, 121 N. W. 606; Parker v. Providence &c. Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, and note, 33 Am. St. 869; Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878; Cogswell v. Concord &c. R. Co., 68 N. H. 192, 195, 44 Atl. 293. But see Pisano v. B. M. Shanley &c. Co., 66 N. J. L. 1, 48 Atl. 618. And compare where the release is fradulent, Aho v. Jesmore, 101 Minn. 449, 112 N. W. 538, 10 L. R. A. (N. S.) 998.

of kin.[20] We are not, at this place, it may be well to say, treating of contracts made in advance stipulating for exoneration from liability for injuries resulting from negligence, but of contracts made after the injury was received. As to contracts made prior to the time the injury is received it is to be said that the rule generally supported by the American decisions is that such contracts are against public policy, and, therefore, ineffective.[21]

§ 2066 (1377). Avoiding releases and compromises.—A release executed by an injured person during life or by his personal representatives after death may, of course, be avoided and annulled in cases where it was procured by fraud.[22] There is no conflict upon the proposition that courts will, in a proper case, relieve against the release or compromise of a claim for damages

[20] Bombolis v. Minneapolis &c. R. Co., 128 Minn. 112, 150 N. W. 385. Settlement by domiciliary administrator for death of one temporarily in another state has been held to bar action by ancillary administrator in latter state although its statute provided that action for death must be brought by administrator qualified by court of such state. Compton's Admr. v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20, L. R. A. 1918D, 666.

[21] Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Railroad Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Roesner v. Hermann, 8 Fed. 782; Mobile &c. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 443, 38 Am. St. 163; Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. 245 and note; Rose v. Des Moines &c. R. Co., 39 Iowa 246; Kansas &c. R. Co. v. Peavey, 29 Kans. 169, 44 Am. R. 630 and note, 34 Kans. 472, 8 Pac. 780; Atchison &c. R. Co. v. Fronk, 74 Kans. 519, 87 Pac. 698, 11 Ann. Cas. 174; Commonwealth v. Vermont &c. R. Co., 108 Mass. 7, 11 Am. Rep. 301; Purdy v. Rome &c. R. Co., 125 N. Y. 209, 26 N. E. 255, 21 Am. St. 736; Johnson v. Fargo, 184 N. Y. 379, 77 N. E. 388, 7 L. R. A. (N. S.) 537n, 6 Ann. Cas. 1; Railway Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 838 and note; Annas v. Milwaukee &c. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. But see Great Western &c. R. Co. v. Bishop, 50 Ga. 465; Fulton &c. Mills Co. v. Wilson, 89 Ga. 318, 15 S. E. 322; Haigh v. Royal Mail &c. R. Co., 52 L. J. Q. B. 640.

[22] Union &c. R. Co. v. Harris, 63 Fed. 800; Jones v. Alabama &c. R. Co., 72 Miss. 32, 16 So. 379; St. Louis &c. R. Co. v. Ault, 101 Miss. 341, 58 So. 102; Byers v. Nashville &c. R. Co., 94 Tenn. 345, 29 S. W. 128; Norvell v. Kanawha &c. R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325; Albrecht v. Milwaukee &c. R. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. 30.

resulting from negligence, but there is conflict upon the question whether the person who receives money or property as a consideration for the release is bound to tender it back. Some of the cases hold that he is not bound to tender it back,[23] others that the amount received by him will be credited to the defendant upon the judgment that may be recovered by the plaintiff, and still others that what is received must be tendered back.[24] In

[23] Chicago &c. R. Co. v. Lewis, 109 Ill. 120; Star &c. Co. v. Sibley, 57 Ill. App. 315; O'Brien v. Chicago &c. R. Co., 89 Iowa 644, 57 N. W. 425 (citing Hendrickson v. Hendrickson, 51 Iowa 68, 50 N. W. 287; Citizens' Bank v. Barnes, 70 Iowa 412, 30 N. W. 857, and approving Gulliher v. Chicago &c. R. Co., 59 Iowa 416, 13 N. W. 429; Wallace v. Chicago &c. R. Co., 67 Iowa 547, 25 N. W. 772); Chicago &c. R. Co. v. Doyle, 18 Kans. 58; Allerton v. Allerton, 50 N. Y. 670; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; International &c. R. Co. v. Brazzil, 78 Tex. 314, 14 S. W. 609. See also Jones v. Alabama &c. R. Co., 72 Miss. 22, 16 So. 379, leading article in 63 Cent. L. J. 85; Indiana &c. R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. 158; Missouri Pac. Ry. Co. v. Goodholm, 61 Kans. 758, 60 Pac. 1066; Bliss v. New York &c. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504; Austin v. Piedmont &c. Co., 67 S. Car. 122, 45 S. E. 135. See Boikens v. New Orleans &c. R. Co. (La.), 19 So. 737, where the amount paid the injured person was under the peculiar provisions of the release held to be a donation. See also Bearden v. St. Louis &c. R. Co., 103 Ark. 341, 146 S. W. 861; Porth v. Cadillac Motor Co., 198 Mich. 501, 165 N. W. 698; St. Louis &c. R. Co. v. Ault, 101 Miss. 341, 58 So. 102.

[24] Vandervelden v. Chicago &c. R. Co., 61 Fed. 54; Barker v. Northern Pac. R. Co., 65 Fed. 460; Hill v. Northern Pac. R. Co., 113 Fed. 914; Birmingham R. &c. Co. v. Jordan, 170 Ala. 530, 54 So. 280; East Tennessee &c. Ry. Co. v. Hayes, 83 Ga. 558, 10 S. E. 350; Strodder v. Southern &c. Co., 94 Ga. 626, 19 S. E. 1022; Drohan v. Lake Shore &c. R. Co., 162 Mass. 435, 38 N. E. 1116; Marple v. Minneapolis &c. R. Co., 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082n, and note on the general subject; Lomax v. Southwest Mo. &c. Co., 119 Mo. App. 192, 95 S. W. 945; Gibson v. Western &c. R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. 586, 40 Cent. L. J. 233; Memphis St. R. Co. v. Giardino (Tenn.), 92 S. W. 855, 63 Cent. L. J. 32. And it is so held in the above cases and in Great Northern Ry. Co. v. Reid, 245 Fed. 86, as to injuries unknown and not in contemplative of the parties notwithstanding great generality and broadness in the language of the release, but it is also held in the above case last cited that a release may be partly impeached where injuries suffered at the time were unknown to both

one of the reported cases it was held that where the injured person had property destroyed in the same accident in which he received his injury, and believed the representation that the money paid him was for the property and not on account of the personal injury, he was not bound to tender it back.[25] It has also been held that a release specifying certain injuries does not operate upon a claim for personal injuries not known to the parties at the time the release was executed.[26] The doctrine of

parties. See also St. Louis &c. R. Co. v. McCrory, 2 Ala. App. 531, 56 So. 822; Western &c. R. Co. v. Atkins, 141 Ga. 743, 82 S. E. 139; Swan v. Great Northern R. Co., 40 N. Dak. 258. 168 N. W. 657, L. R. A. 1918F, 1063. In Louisville &c. R. Co. v. Herr, 135 Ind. 591, 35 N. E. 556, it is held that there must be a disaffirmance and the clear implication is that there must be a restoration of the thing received as the consideration for the release. See also Citizens St. R. Co. v. Horton, 18 Ind. App. 335, 48 N. E. 22; South Bend &c. Co. v. Jensen, 182 Ind. 557, 105 N. E. 774; Bramble v. Cincinnati &c. R. Co., 132 Ky. 547, 116 S. W. 742. See International &c. R. Co. v. Brazzil, 78 Tex. 314, 14 S. W. 609, 44 Am. & Eng. R. Cas. 437; Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 103; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 131, 25 N. E. 869; South Bend &c. Gas. Co. v. Jensen, 182 Ind. 557, 105 N. E. 774. But there are exceptional cases, as, for instance, where he would in any event be entitled to as much as was received. Winter v. Kansas City &c. R. Co.. 160 Mo. 159, 190, 61 S. W. 606; Girard v. St. Louis &c. Co., 123 Mo. 358, 387, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. 556. As to giving credit or deducting from verdict, see Bearden v. St. Louis &c. R. Co., 103 Ark. 341, 146 S. W. 861; Roberts v. Colorado Springs &c. R. Co., 45 Colo. 188, 101 Pac. 59; Litchfield &c. R. Co. v. Shuler, 134 Ill. App. 615; O'Brien v. Chicago &c. Ry. Co., 89 Iowa 644, 57 N. W. 425; Chicago &c. R. Co. v. Doyle, 18 Kans. 58; West v. Seaboard &c. R. Co., 151 N. Car. 231, 65 S. E. 979; St. Louis &c. R. Co. v. Richards, 23 Okla. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; Haslun v. Holy Terror &c. Co., 16 S. Dak. 261, 92 N. W. 31; Galveston &c. R. Co. v. Cade (Tex. Civ. App.), 93 S. W. 124; note in 35 L. R. A. (N. S.) 661. But compare Lyons v. Allen, 11 App. (D. C.) 543.

[25] Bliss v. New York &c. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504. See Mullen v. Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349; Droham v. Lake Shore &c. R. Co., 162 Mass. 435, 38 N. E. 1116.

[26] Union &c. R. Co. v. Artist, 60 Fed. 365, 23 L. R. A. 581; Lumley v. Wabash R. Co., 76 Fed. 66. But where specific injuries are not designated and others are feared, a release will include all injuries from the same cause. Eccles v.

the majority of the cases seems to us to be erroneous. We can see no reason why such a case should not fall within the general rule that one who receives a thing of value must tender it back in order to be entitled to a recovery on the original claim. The rule which we venture to criticize is productive of evil consequences inasmuch as it tends to prevent the compromise of controversies and to increase litigation. So, too, it arms a plaintiff with the means of prosecuting an action against the person with whom he effected a settlement, and this is unjust.[27] But, where the release is absolutely void for fraud, so that no contract ever really existed, there is much reason for holding it sufficient to credit the amount received on the recovery. Some of the courts hold that a release is effective until annulled by a court of equity.[28] But others, and probably a majority, hold that fraud

Union &c. R. Co., 7 Utah 335, 26 Pac. 924. See also Houston &c. R. Co. v. McCarty, 94 Tex. 298, 60 S. W. 429, 86 Am. St. 854, 53 L. R. A. 507, note in 55 Am. St. 507-513.

[27] It may be, however, that a distinction should be made between cases where the fraud goes to inducing the injured person to sign a release which he understands and those in which it goes to inducing him to sign what he does not understand, under representation that it is not a release or the like. Such a distinction is suggested in note in 35 L. R. A. (N. S.) 660, and L. R. A. 1915F, 1073, where many recent cases are reviewed and it is said that this distinction will reconcile most of them, tender generally being required in the former class and not in the latter. Some of the decisions also note this distinction.

[28] Och v. Missouri &c. R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442 (rule since changed in Missouri, however); Hill v. Northern Pac. R. Co., 104 Fed. 754; Vandervelden v. Chicago &c. R. Co., 61 Fed. 54. See also George v. Tate, 102 U. S. 564, 570, 26 L. ed. 232; Gould v. Cayuga &c. Bank, 86 N. Y. 75. A distinction is made between cases in which the release is intentionally executed but is voidable because of misrepresentation or deceit, in which case most of these authorities hold that it must first be avoided in equity, and cases in which it is absolutely void for fraud in its execution. See also Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910; Hemmick v. Baltimore &c. R. Co., 263 Ill. 241, 104 N. E. 1027; Hartley v. Chicago &c. R. Co., 214 Ill. 78, 73 N. E. 398; Atchison &c. R. Co. v. Vandordetrand, 67 Kans. 386, 73 Pac. 113; Homuth v. Metropolitan &c. R. Co., 129 Mo. 629, 31 S. W. 903. Of course, a release fairly obtained and supported by a valuable consideration is effective. Retzer v. Jacob Dold Packing Co., 58 Mo. App. 264; Sykora v. Case &c. Co., 59 Minn. 130, 60 N. W. 1008.

in procuring it may be set up in the action at law.[29] The party who assails the release must, as is well known, affirmatively establish its invalidity, and this, where fraud is relied on, can only be done by proving some artifice, trick, or some fraudulent misrepresentation of a fact or facts.[30] It is held that if a release, although under seal, is shown to be without consideration, it will not defeat a recovery.[31]

[29] Brundidge v. Nashville &c. R. Co., 112 Tenn. 526, 81 S. W. 1248; Memphis St. R. Co. v. Giardino, 116 Tenn. 368, 92 S. W. 855, 8 Ann. Cas. 176, 63 Cent. L. J. 32 and note; Rauen v. Prudential &c. Co., 129 Iowa 725, 106 N. W. 198; Alabama &c. R. Co. v. Jones, 73 Miss. 110, 19 So. 105, 86 Am. St. 488; Wagner v. National &c. Insurance Co., 90 Fed. 395, and cases there cited; Missouri Pac. R. Co. v. Goodholm, 61 Kans. 758, 60 Pac. 1066.

[30] Johnson v. Chicago &c. R. Co., 107 Iowa 1, 77 N. W. 746; Spitze v. Baltimore &c. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. 378 and note, 48 Am. & Eng. R. Cas. 495; Doty v. Chicago &c. R. Co., 49 Minn. 499, 52 N. W. 135; Nelson v. Minneapolis &c. R. Co., 61 Minn. 167, 63 N. W. 486; Homuth v. Metropolitan &c. R. Co., 129 Mo. 629, 31 S. W. 903; Mathis v. Kansas City &c. R. Co., 185 Mo. 434, 459, 84 S. W. 66; Thomas v. Chicago &c. R. Co., 49 Mo. App. 110; Lomax v. Southwest Mo. &c. R. Co., 119 Mo. App. 192, 95 S. W. 945; Albrecht v. Milwaukee &c. Ry. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. 30. See Union &c. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. ed. 1003, citing Chicago &c. R. Co. v. Lewis, 109 Ill. 120; Smith v. Occidental &c. Steamship Co., 99 Cal. 462, 34 Pac. 84; Illinois &c. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; National &c. Co. v. Carlson, 47 Ill. App. 178; Chicago &c. R. Co. v. Doyle, 18 Kans. 58; Stone v. Chicago &c. R. Co., 66 Mich. 76, 33 N. W. 24; Mateer v. Missouri &c. R. Co., 105 Mo. 320, 16 S. W. 839; Dixon v. Brooklyn &c. R. Co., 100 N. Y. 170, 3 N. E. 65; Lusted v. Chicago &c. Ry. Co., 71 Wis. 391, 36 N. W. 857, and see 6 Thomp. Neg. §§ 734-737, for examples of releases set aside and those not set aside for fraud or misrepresentation. Of course mental incapacity or even intoxication is often an important element although seldom conclusive in itself. See also Denver R. Co. v. Ptolemy (Colo.), 169 Pac. 541; Seymour v. Chicago &c. R. Co., 181 Iowa 218, 164 N. W. 352 (must be more than mere matter of opinion).

[31] Wabash &c. R. Co. v. Brow, 65 Fed. 941. But see generally as to consideration note to Missouri &c. R. Co. v. Smith, 98 Tex. 47, 81 S. W. 22, 66 L. R. A. 741, in 107 Am. St. 607, 615, et seq.; and see Hemmick v. Baltimore &c. R. Co., 263 Ill. 241, 104 N. E. 1027; Gulf &c. Ry. Co. v. Minter, 42 Tex. Civ. App. 235, 93 S. W. 516, 518. That the consideration may be shown by parol evidence, see Tylee v.

§ 2067 (1378). Measure of damages.—It may be safely said that the general rule is that in actions to recover for injuries resulting in death the amount of the recovery is to be measured by the pecuniary loss sustained by the persons for whose benefit the statute gives a right of recovery,[32] not exceeding, of course, the amount allowed by statute and claimed in the complaint or

Illinois Cent. R. Co., 97 Nebr. 646, 150 N. W. 1015, and cases there cited.

[32] The decisions are very numerous and we cite very few of the great number. Blake v. Midland &c. R. Co., 18 Q. B. 93; Railroad Co. v. Barron, 5 Wall. (U. S.) 90, 18 L. ed. 591; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624; Ladd v. Foster, 31 Fed. 827; Atchison &c. R. Co. v. Wilson, 48 Fed. 57; Kelley v. Central &c. R. Co., 48 Fed. 663; Farmers' &c. Co. v. Toledo &c. R. Co., 67 Fed. 73; Louisville &c. R. Co. v. Trammell, 93 Ala. 350, 9 So. 870; Bromly v. Birmingham &c. R. Co., 95 Ala. 397, 11 So. 341; Morgan v. Southern &c. R. Co., 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71 and note, 29 Am. St. 143; Pepper v. Southern &c. R. Co., 105 Cal. 389, 38 Pac. 974; Pierce v. Conners, 12 Colo. 178, 37 Pac. 721; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; North Chicago St. R. Co. v. Brodie, 156 Ill. 317, 40 N. E. 942; Louisville &c. R. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Kansas Pacific &c. R. Co. v. Cutter, 19 Kans. 83; Mynning v. Detroit &c. R. Co., 59 Mich. 257, 26 N. W. 514; Walker v. Lake Shore &c. R. Co., 104 Mich. 606, 62 N. W. 1032; Hutchins v. St. Paul &c. R. Co., 44 Minn. 5, 46 N. W. 79; Telfer v. Northern &c. R. Co., 30 N. J. L. 188; Carlson v. Oregon &c. R. Co., 21 Ore. 450, 28 Pac. 497; Pennsylvania &c. R. Co. v. Butler, 57 Pa. 335; Huntington &c. Co. v. Decker, 84 Pa. St. 419; Garrick v. Florida &c. R. Co., 53 S. Car. 448, 31 S. E. 334, 69 Am. St. 874; Smith v. Chicago &c. R. Co., 6 S. Dak. 583, 62 N. W. 967; Galveston &c. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573; Webb v. Denver &c. R. Co., 7 Utah 17, 24 Pac. 616; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. 936. It is so held under the Federal Employers' Liability Act where the action is merely for the death. Gulf &c. Ry. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785. Limitation of amount in statute in force at time of death has been held to govern. Love v. Detroit &c. R. Co., 170 Mich. 1, 135 N. W. 963; Keeley v. Great Northern R. Co., 139 Wis. 448, 121 N. W. 167. As to character and sufficiency of evidence to show pecuniary loss to parents by death of child, see note in L. R. A. 1918E, 278. And as to presumption and burden of proof as to pecuniary loss generally in action for death, see note in L. R. A. 1918C, 1056.

declaration. In some of the states provision is made for exemplary damages, and, of course, in such states the general rule we have stated does not apply. The right to recover is not in whole or in part defeated by the fact that the beneficiaries received money on policies of life insurance taken out by the decedent.[33] Life or mortality tables are admissible in evidence,[34] but such tables are not to be taken as fixing the expectancy of life of the particular person. The only legitimate use that can be made of such tables is to aid the jury in ascertaining the probable duration of life, for they do not do more than furnish some evidence upon that question; more than this they cannot do. It is proper, as we conceive, and, indeed, necessary to instruct the jury as to the effect of life or mortality tables,[35] for, while they

[33] Pittsburgh &c. R. Co. v. Thompson, 56 Ill. 138; Sherlock v. Alling, 44 Ind. 184; Carroll v. Missouri &c. R. Co., 88 Mo. 239, 57 Am. Rep. 382 and note, 26 Am. & Eng. R. Cas. 268; Althorf v. Wolfe, 22 N. Y. 355; Kellogg v. New York &c. R. Co., 79 N. Y. 72; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Coulter v. Pine Tp., 164 Pa. St. 543, 30 Atl. 490; Baltimore &c. R. Co. v. Wightman, 29 Grat. (Va.) 431, 26 Am. Rep. 384.

[34] Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257; Central &c. R. Co. v. Richards, 62 Ga. 306; Central R. Co. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; Louisville &c. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343; Shover v. Myrick, 4 Ind. App. 7, 13, 30 N. E. 207; Donaldson v. Mississippi &c. R. Co., 18 Iowa 280, 87 Am. Dec. 391; Walters v. Chicago &c. R. Co., 41 Iowa 71; Coates v. Burlington &c. R. Co., 62 Iowa 486, 17 N. W. 760; Worden v. Humeston &c. R. Co., 76 Iowa 310, 41 N. W. 26, Mills v. Catlin, 22 Vt. 98; Gorman v. Minneapolis &c. R. Co., 78 Iowa 509, 43 N. W. 303; Haden v. Sioux City &c. R. Co., 92 Iowa 226, 60 N. W. 537; Louisville &c. R. Co. v. Mahony, 7 Bush (Ky.) 235; Cooper v. Lake Shore &c. R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; Hunn v. Michigan &c. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500 and note; Scheffler v. Minneapolis &c. R. Co., 32 Minn. 125, 19 N. W. 656; Sellars v. Foster, 27 Nebr. 118, 42 N. W. 907; Sauter v. New York &c. R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Mississippi &c. R. Co. v. Ayres, 16 Lea (Tenn.) 725; San Antonio &c. R. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; McKigue v. Janesville, 68 Wis. 50, 31 N. W. 298; 1 Elliott Ev. § 418. In Rajnowski v. Detroit &c. R. Co., 74 Mich. 20, 41 N. W. 847, the injured person was a child five years of age and it was held prejudicial error to admit in evidence life tables not giving the expectancy of any person under ten years of age.

[35] Campbell v. York, 172 Pa. St.

are instruments of evidence, many other elements enter into the question of the computation of damages. There are many contingencies to be considered, as, for instance, the probability of physical ability to labor or conduct business, the exposure to danger, the probability of obtaining employment, and the like.[36] Unless instructions are given to the jury justly limiting the effect of mortality tables as evidence, the jury are likely to give them undue weight, and treat them as conclusive evidence of the duration of the particular life, and to leave out of mind elements that justice requires should have due consideration. It is held that it is not necessary that the evidence should supply the jury with the exact data upon which to compute damages,[37] but we

205, 33 Atl. 879, citing Steinbrunner v. Pittsburgh &c. Ry. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. 806; McCue v. Knoxville, 146 Pa. St. 580, 23 Atl. 439; Kraut v. Frankford &c. R. Co., 160 Pa. St. 327, 28 Atl. 783. See also 1 Elliott Ev. § 418. It has been held that the courts should take judicial notice of them and instruct on the subject when properly requested, even though they are not actually introduced in evidence. Ruehl v. Lidgerwood &c. Tel. Co., 23 N. Dak. 6, 135 N. W. 793, L. R. A. 1918C, 1063, Ann. Cas. 1914C, 680n. See also Nelson v. Branford Lighting &c. Co., 75 Conn. 548, 54 Atl. 303.

[36] Savannah &c. R. Co. v. McLeod, 94 Ga. 530, 20 S. E. 434; Railroad Co. v. Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. 907. There can not be any fixed and certain rule where so many contingencies enter into the inquiry. St. Louis &c. R. Co. v. Needham, 52 Fed. 371, 378; Vicksburg &c. R. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257. Compare also Jacksonville Elec. Co. v. Bowden, 54 Fla. 461, 45 So. 755, 15 L. R. A. (N. S.) 451; Golden v. Spokane &c. R. Co., 20 Idaho 526, 118 Pac. 1076; Conklin v. Central N. Y. Tel. &c. Co., 130 App. Div. 308, 114 N. Y. S. 190. But see Farmers' &c. Co. v. Toledo &c. R. Co., 67 Fed. 73. In Atchison &c. R. Co. v. Hughes, 55 Kans. 491, 40 Pac. 919, it was held that such tables were not indispensable evidence as the jury may base their conclusion upon other facts. See also Boswell v. Barnhart, 96 Ga. 521, 23 S. E. 414. And it has been held that judicial notice may be taken of such tables and the jury instructed as to the life expectancy without their introduction in evidence. Ruehl v. Lidgerwood &c. Tel. Co., 23 N. Dak. 6, 135 N. W. 793, L. R. A. 1918C, 1063, Ann. Cas. 1914C, 680, where there is an elaborate note on the use of such tables in actions for damages for death.

[37] Baltimore &c. R. Co. v. Then, 159 Ill. 535, 42 N. E. 971; Ohio &c. R. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760; Robel v. Chicago &c. R. Co., 35 Minn. 84, 27 N. W. 305.

suppose there must be, in the absence of statutory provisions to the contrary, some evidence upon which the jury can legally act, for the matter cannot be left wholly and entirely to conjecture.[38] Possibly some damages of a nominal character might be awarded in the absence of evidence, but if there be no evidence at all upon the subject a verdict cannot go beyond damages of a nominal nature, although, perhaps, the recovery would not be limited to strictly nominal damages.[39] It is not necessary that there should be direct evidence of pecuniary loss, for that fact may be inferred from circumstances.[40] The capacity to earn money, and the amount of the earnings, may be shown in evidence,[41] not, however, for the purpose of fixing an absolute

[38] See Swift &c. Co. v. Johnson, 138 Fed. 867, 1 L. R. A. (N. S.) 1161; Cherokee &c. Co. v. Limb, 47 Kans. 469, 28 Pac. 181; Burk v. Arcata &c. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. 52.

[39] Howard v. Delaware &c. R. Co., 40 Fed. 195, 6 L. R. A. 75 and note. See as to nominal damages being allowed even though there is no actual proof of loss. Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. 814; Burk v. Arcata &c. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. 52; Scherer v. Schlaberg, 18 N. Dak. 421, 122 N. W. 1000, 24 L. R. A. (N. S.) 520. And see as to presumption of loss, Seaboard Air Line R. Co. v. Moseley, 60 Fla. 186, 53 So. 718; Cleveland &c. R. Co. v. Starks, 174 Ind. 345, 92 N. E. 54; Sceba v. Manistee R. Co., 189 Mich. 308, 155 N. W. 414.

[40] As to when damages are too remote, see Colorado &c. R. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; Bonnet v. Galveston &c. R. Co., 89 Tex. 72, 33 S. W. 334. As to what are not. Catawissa &c. R. Co. v. Armstrong, 52 Pa. St. 282; Castello v. Landwehr, 28 Wis. 522; Lake Erie &c. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Tuteur v. Chicago &c. R. Co., 77 Wis. 505, 46 N. W. 897. It is held that where liability for death of a minor child is established the father may recover for loss of services upon proof that the child was able to render valuable services, without proving actual rendition of such services. Southern R. Co. v. Jarrett, 20 Ga. App. 648, 93 S. E. 240.

[41] Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624; St. Louis &c. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Georgia Cent. R. Co. v. Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210; Pittsburgh &c. R. Co. v. Kinnare, 203 Ill. 388, 67 N. E. 826, 827; Simonson v. Chicago &c. R. Co., 49 Iowa 87; Beems v. Chicago &c. R. Co., 58 Iowa 150, 12 N. W. 222; Lowe v. Chicago &c. R. Co., 89 Iowa 420, 56 N. W. 519; Fish v. Illinois Cent. R. Co., 96 Iowa 702,

standard, for in all cases there are contingencies to be considered such as arise in the life of almost every person.

§ 2068 (1378a). Measure of damages—Evidence.—As stated in the last preceding section, the damages under most statutes are measured by the pecuniary loss, and no more definite rule can well be laid down as applicable to all cases. The reasonable expectation of the beneficiaries of pecuniary advantage from the life of the deceased is taken into account,[42] and the damages are

65 N. W. 995; 3 Elliott Ev. § 2017. See generally, Central &c. R. Co. v. Rouse, 80 Ga. 442, 5 S. E. 627; Louisville &c. R. Co. v. Orr, 91 Ala. 548, 8 So. 360; Clapp v. Railway Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. 629; Board v. Legg, 110 Ind. 479, 11 N. E. 612; Hogue v. Chicago &c. R. Co., 32 Fed. 365.

[42] See Baltimore &c. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624; Louisville &c. R. Co. v. Morgan, 114 Ala. 449, 22 So. 20; St. Louis &c. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Denver &c. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Cleveland &c. R. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Van Brunt v. Cincinnati &c. R. Co., 78 Mich. 530, 44 N. W. 321; Anderson v. Chicago &c. R. Co., 35 Nebr. 95, 52 N. W. 840; Missouri &c. R. Co. v. Baier, 37 Nebr. 235, 55 N. W. 913; May v. West Jersey &c. R. Co., 62 N. J. L. 63, 42 Atl. 163; Countryman v. Fonda &c. R. Co., 166 N. Y. 201, 59 N. E. 822, 82 Am. St. 640; Benton v. North Carolina R. Co., 122 N. Car. 1007, 30 S. E. 333; Galveston &c. R. Co. v. Kutas, 72 Tex. 643, 11 S. W. 127; Galveston &c. R. Co. v. Worthy, 87 Tex. 459, 29 S. W. 376; Lierman v. Chicago &c. R. Co., 82 Wis. 286, 52 N. W. 91, 33 Am. St. 37. See also Louisville &c. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; Savannah &c. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. 183; Florida Cent. &c. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. 149. The fact that there is no legal liability to support the beneficiary does not prevent recovery if there is a reasonable expectation of continued support or advantage from the life of the deceased which is taken away by the death, but only the pecuniary loss is to be considered, and contingencies and uncertainties are usually to be taken into account. Chicago &c. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Louisville &c. R. Co. v. Wright, 134 Ind. 509, 34 N. E. 314; Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Howard v. Delaware &c. Co., 40 Fed. 195, 6 L. R. A. 75 and note. See also Sneed v. Marysville &c. Co., 149 Cal. 704, 87 Pac. 376; Consolidated Coal Co. v. Shepherd, 220 Ill. 123, 77 N. E. 133; Chicago &c. R. Co. v. Vester, 47 Ind. App. 141, 93 N. E. 1039; Indianapolis Trac. &c. Co. v. Lee, 67 Ind. App. 105, 118 N. E. 959; Raines v. Southern R.

awarded as compensation for the pecuniary loss caused by the death. In the case of the death of a parent it is generally held that the loss to the minor children of physical, intellectual and moral instruction and training, is a proper element of damages.[43] But in an action by one spouse for the death of the other, or by a parent for the death of a child, or by the next of kin for the death of the deceased, it is generally held that loss of society is not a proper element of damages.[44] So, under statutes giving a

Co., 169 N. Car. 189, 85 S. E. 294, L. R. A. 1918C, 1052 and note on presumption and burden of proof in such cases. As to opinion evidence to show value of services and pecuniary loss, see Sceba v. Manistee R. Co., 189 Mich. 308, 155 N. W. 414, L. R. A. 1918C, 1090 and note.

[43] It is generally, although not universally held that parent's recovery is a proper case for death of child may extend to damages beyond minority. See Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50n, and elaborate note on the subject. Northern Pac. R. Co. v. Freeman, 83 Fed. 82; St. Louis &c. R. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. 65; Green v. Southern Cal. R. Co. (Cal.), 67 Pac. 4; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Howard County v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Stoher v. St. Louis &c. R. Co., 91 Mo. 509, 4 S. W. 389; Sternfels v. Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117; Galveston &c. R. Co. v. Davis, 27 Tex. Civ. App. 279, 65 S. W. 217; Searle v. Kanawha &c. R. Co., 32 W. Va. 370, 9 S. E. 248. See also St. Louis &c. R. Co. v. Standifer, 81 Ark. 275, 99 S. W. 81; Goddard v. Ensler, 222 Ill. 462, 78 N. E. 805; Omaha Water Co. v. Schamel, 147 Fed. 502; Duke v. St. Louis &c. Ry. Co., 172 Fed. 684.

[44] Atchison &c. R. Co. v. Wilson, 48 Fed. 57; Northern Pac. R. Co. v. Freeman, 83 Fed. 82; Little Rock &c. R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; Munro v. Pacific &c. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. 248; Wales v. Pacific &c. Co., 130 Cal. 521, 62 Pac. 932, 1120; Donaldson v. Mississippi &c. R. Co., 18 Iowa 280, 87 Am. Dec. 391; Mobile &c. R. Co. v. Watly, 69 Miss. 145, 13 So. 825; Schaub v. Hannibal &c. R. Co., 106 Mo. 74, 16 S. W. 924; Sternfels v. Metropolitan St. R. Co., 77 App. Div. 309, 77 N. Y. S. 309; Illinois Cent. R. Co. v. Bentz, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. 763; Taylor &c. R. Co. v. Warner, 84 Tex. 122, 19 S. W. 449, 20 S. W. 823; Galveston &c. R. Co. v. Worthy, 87 Tex. 459, 29 S. W. 376. Nor is mental suffering such as grief of the beneficiaries for the bereavement. Alabama &c. R. Co. v. Burgess, 116 Ala. 509, 22 So. 913; St. Louis &c. R. Co. v. Hicks, 79 Fed. 262; Baldwin v. Peoples' R. Co., 7 Pen. (Del.) 81, 76 Atl. 1088; Florida Cent. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. 149; Chicago &c. R. Co. v. Ranis,

new right of action for the benefit of designated beneficiaries, such as the widow and children, or next of kin, the pain or suffering of the deceased is not a proper element of damages.[45] Where the recovery, under the particular statute, is for the benefit of the estate, it is generally measured by the amount which would probably have been saved to the estate, taking into

203 Ill. 417, 67 N. E. 840; Commercial Club v. Hilliker, 20 Ind. App. 239, 50 N. E. 578; Louisville &c. R. Co. v. Graham, 98 Ky. 688, 34 S. W. 229; Barth v. Kansas City &c. R. Co., 142 Mo. 535, 44 S. W. 778; Carlson v. Oregon Short Line &c. R. Co., 21 Ore. 450, 28 Pac. 497; Huntington &c. R. Co. v. Decker, 84 Pa. St. 419; Knoxville &c. R. Co. v. Wyrich, 99 Tenn. 500, 42 S. W. 434; McGowan v. International &c. R. Co., 85 Tex. 289, 20 S. W. 80; Corbett v. Oregon &c. R. Co., 25 Utah 449, 71 Pac. 1065; Potter v. Chicago &c. R. Co., 21 Wis. 372, 94 Am. Dec. 548; Blake v. Midland R. Co., 18 Q. B. 93; 6 Thomp. Neg. § 7082. See also Felt v. Puget Sound Elec. R. Co., 175 Fed. 477; Pittsburgh &c. R. Co. v. Brown, 178 Ind. 11, 97 N. E. 145; Missouri &c. R. Co. v. Williams (Tex. Civ. App.), 117 S. W. 1043. But under some statutes loss of society and companionship is considered a proper element of damages in some of such cases. Evarts v. Santa Barbara &c. R. Co., 3 Cal. App. 712, 86 Pac. 830; Anderson v. Great Northern R. Co., 15 Idaho 513, 99 Pac. 91; St. Louis &c. R. Co. v. Moore, 101 Miss. 768, 58 So. 471, 39 L. R. A. (N. S.) 978, Ann. Cas. 1914B, 597n. And so, in a few jurisdictions as to mental anguish of parents for loss of child. Roby v. Kansas City &c. R. Co., 130 La. 896, 58 So. 696; Kelley v. Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898.

[45] James v. Richmond &c. R. Co., 92 Ala. 231, 9 So. 335; Holton v. Daly, 106 Ill. 131; Dwyer v. Chicago &c. R. Co., 84 Iowa 479, 51 N. W. 244, 35 Am. St. 322; Oakes v. Maine Cent. R. Co., 95 Maine 103, 49 Atl. 418; Galveston &c. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573. See also The Corsair (Barton v. Brown), 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; Louisville &c. R. Co. v. Graham, 98 Ky. 688, 34 S. W. 229; Cerrilos Coal R. Co. v. Deserant, 9 N. Mex. 49, 49 Pac. 807; Oldfield v. New York &c. R. Co., 14 N. Y. 310; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Corbett v. Short Line R. Co., 25 Utah 449, 71 Pac. 1065; 6 Thomp. Neg. § 7095. See also Dillon v. Great Northern R. Co., 38 Mont. 485, 100 Pac. 960. But it is held otherwise under the survival statutes. St. Louis &c. R. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Louisville &c. R. Co. v. Sanders, 19 Ky. L. 1941, 44 S. W. 644; Sweetland v. Chicago &c. R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568; Illinois Cent. R. Co. v. Harris (Miss.), 29 So. 760; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296.

consideration the occupation, age, health, habits of industry, sobriety and economy of the deceased, and his probable duration of life,[46] much the same as under the other statutes. Proper evidence is admissible on these points, and, in statutes designating beneficiaries, evidence as to the character and habits of the deceased in such respects, and as to his domestic relations, at least with respect to making provision for the beneficiaries, is usually competent.[47] There is some actual and much apparent conflict among the authorities as to whether evidence of the physical and pecuniary condition and poverty of the beneficiaries is competent. Many authorities hold that such evidence[48] is ad-

[46] Carlson v. Oregon Short Line &c. R. Co., 21 Ore. 450, 28 Pac. 497; Louisville &c. R. Co. v. Creighton, 106 Ky. 42, 50 S. W. 227; Lowe v. Chicago &c. R. Co., 89 Iowa 420, 56 N. W. 519; Neal v. Wilmington &c. R. Co., 3 Penn. (Del.) 467, 53 Atl. 338; Holmes v. Oregon &c. R. Co., 5 Fed. 523. See also Alabama &c. R. Co. v. Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. 121 (also the amount of his property or what he had accumulated); Linss v. Chesapeake &c. R. Co., 91 Fed. 964; Kansas Pac. R. Co. v. Cutter, 19 Kans. 83; Louisville &c. R. Co. v. Lucas, 30 Ky. L. 359, 98 S. W. 308; Keyes v. Valley Tel. Co., 132 Mich. 281, 93 N. W. 623; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282. And see as to recovery for pain and suffering under survival statute. Atchison &c. R. Co. v. Rowe, 56 Kans. 411, 43 Pac. 683; Maher v. Philadelphia Trac. Co., 181 Pa. St. 391, 37 Atl. 571; also Murphy v. New York &c. R. Co., 29 Conn. 496; Chicago &c. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; but compare Cregin v. Brooklyn &c. Railroad Co., 83 N. Y. 595, 38 Am. Rep. 474. See generally as to character and sufficiency of evidence to show pecuniary loss to estate the elaborate note in L. R. A. 1918C, 111-115.

[47] Bromley v. Birmingham &c. R. Co., 95 Ala. 397, 11 So. 341; Augusta &c. R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Anthony &c. Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Ohio &c. R. Co. v. Voight, 122 Ind. 288, 23 N. E. 774; Elwood v. Addison, 26 Ind. App. 28, 59 N. E. 47; Smith v. Cleveland &c. R. Co., 67 Ind. App. 397, 117 N. E. 534; Wheelan v. Chicago &c. R. Co., 85 Iowa 167, 52 N. W. 119; Clapp v. Minneapolis &c. R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. 629; Meekins v. Norfolk &c. R. Co., 134 N. Car. 217, 46 S. E. 493; Standlee v. St. Louis &c. R. Co., 25 Tex. Civ. App. 340, 60 S. W. 781; Pool v. Southern Pac. R. Co., 7 Utah 303, 26 Pac. 654; Chilton v. Union Pac. R. Co., 8 Utah 47, 29 Pac. 963; 3 Elliott Ev. §§ 2016, 2017; note in 85 Am. St. 841.

[48] Louisville &c. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; Little Rock &c. R. Co. v. Leverett, 48

missible, but many others hold that it is incompetent,[49] and we are inclined to think that the latter is the better doctrine, at least in ordinary cases, where the question is as to direct, and not merely collateral, beneficiaries, and there is no necessity of showing their dependence upon the deceased for support.[50] On this

Ark. 333, 3 S. W. 50, 3 Am. St. 230; Louisville &c. R. Co. v. Jones, 45 Fla. 407, 34 So. 246; Hunt v. Conner, 26 Ind. App. 41, 59 N. E. 50; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. 557; Haehl v. Wabash R. Co., 119 Mo. 325, 24 S. W. 737. But see Waller v. Chicago &c. R. Co., 120 Mo. 635, 23 S. W. 1061; Cooper v. Lake Shore &c. R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Fowler v. Buffalo &c. Co., 41 App. Div. 84, 58 N. Y. S. 223, 7 Am. Rep. 233; Thompson v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298. See also Lockwood v. New York &c. R. Co., 98 N. Y. 523; Barley v. Chicago &c. R. Co., 4 Biss. (U. S.) 430.

[49] Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Green v. Southern Pac. R. Co., 122 Cal. 563, 55 Pac. 577; Holt v. Spokane &c. R. Co., 4 Idaho 443, 40 Pac. 56; Chicago &c. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; Delphi v. Lowry, 74 Ind. 520, 527, 39 Am. Rep. 98; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Benton v. Chicago &c. R. Co., 55 Iowa 498, 8 N. W. 330; Chicago &c. R. Co. v. Holmes, 68 Nebr. 826, 94 N. W. 1007; Cincinnati &c. R. Co. v. Altemeier, 60 Ohio St. 10, 53 N. E. 300; 3 Elliott Ev. § 2017. We think this is certainly the better rule in ordinary cases where the beneficiary is a lineal descendant or one entitled as a matter of law to support. See also English v. Southern Pac. R. Co., 13 Utah 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. 772; Seattle Elec. Co. v. Hartless, 144 Fed. 379; Illinois &c. R. Co. v. Baches, 55 Ill. 379; Pittsburgh &c. R. Co. v. Kinnare, 105 Ill. App. 566, affirmed in 203 Ill. 388, 67 N. E. 826; Consolidated Gas &c. Co. v. State, 109 Md. 186, 72 Atl. 651; Gundy v. Nye-Schneider &c. Co., 89 Nebr. 599, 131 N. W. 964; Evans v. Oregon &c. R. Co., 37 Utah 431, 108 Pac. 638, Ann. Cas. 1912C, 259n.

[50] There may be cases as in some of those cited in favor of the admissibility of such evidence, where it is competent under the particular statute or under the particular circumstances, as, for instance, to show that the alleged beneficiary was dependent upon the deceased for support although having no strict legal right thereto. This distinction harmonizes many of the cases and does away with much of the apparent conflict. Life expectancy of parents entitled to damages is held not to be considered in determining amount. Alabama &c. Co. v. Griffin, 149 Ala. 423, 42 So. 1034.

general subject it has been observed by the Pennsylvania Supreme Court: "It is argued that while the husband might have lived a certain number of years, yet the wife might not, and therefore her damages ought to be limited by the double contingency of their joint lives. The point is new, and the fact that it has not been raised before in any of the very numerous cases where it would have been appropriate if sound, would seem to indicate that it has not appeared tenable to the professional mind. We are of this opinion. The life of the husband having been terminated by the accident, its probable duration in the regular course of nature must, as already said, be approximated by the best evidence attainable, even though that leads only to conjecture. But the widow, plaintiff, is living and is entitled now to compensation for what she had lost by her husband's death. To complicate the question by another conjecture as to her expectation of survivorship, would add further uncertainty in the result without being so clearly demanded by reason or justice as to be imperative or even advisable.[51] It has been held that although the beneficiary married the injured man after the injury and only two or three days before his death, substantial damages the same as if they had been husband and wife at the time of the injury.[52]

§ 2069 (1378b). **Mitigation of damages.**—The fact that the beneficiaries have received money from an insurance company for the death of the deceased cannot be shown in mitigation of damages.[53] Neither can it be shown in mitigation that the widow

[51] Emery v. Philadelphia, 208 Pa. St. 492, 57 Atl. 977. See generally Chesapeake &c. R. Co. v. Dwyers, Admx. 162 Ky. 427, 172 S. W. 918.

[52] Radley v. Leray Paper Co., 214 N. Y. 32, 108 N. E. 86, L. R. A. 1915E, 1199n. See also Gross v. Elec. Trac. Co., 180 Pa. St. 99, 36 Atl. 424. Remarriage of widow does not cause action to abate and should not be considered in assessment of damages. Wabash R. Co. v. Gretzinger, 182 Ind. 155, 104 N. E. 69. See, however, note in 67 L. R. A. 95.

[53] Western &c. R. Co. v. Meigs, 74 Ga. 857; Sherlock v. Alling, 44 Ind. 184; Spaulding v. Chicago &c. R. Co., 98 Iowa 205, 67 N. W. 227; Carroll v. Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382; Kellogg v. New York &c. R. Co., 79 N. Y. 72; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Lipscomb v. Houston &c. R. Co., 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am.

or the husband, as the case may be, in an action by the one for the death of the other, has remarried,[54] or that the beneficiary has received property by descent from the deceased.[55] It has also been held that the fact that the defendant paid the funeral expenses and expenses of supporting the deceased from the time of his injury to the time of his death cannot be shown in mitigation.[56] But it has been held, on the other hand, that, in an action to recover damages for the death of a minor, the fact that he had been emancipated may be considered in mitigation of damages,[57] and that in other cases evidence is admissible to show the deceased was an habitual drunkard, or the like, as tending to mitigate or decrease the damages.[58]

St. 804; Houston &c. R. Co. v. Lemair, 55 Tex. Civ. App. 237, 119 S. W. 1162; Baltimore &c. R. Co. v. Wightman, 29 Grat. (Va.) 431, 26 Am. Rep. 384; 3 Elliott Ev. § 2019. See also Clune v. Ristine, 94 Fed. 745; Geary v. Metropolitan St. R. Co., 73 App. Div. 441, 77 N. Y. S. 54; Boulden v. Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906.

[54] Chicago &c. R. Co. v. Driscoll, 107 Ill. App. 615, affirmed in 207 Ill. 9, 69 N. E. 620; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Davis v. Guarneeri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. 548; Philpott v. Pennsylvania R. Co., 175 Pa. St. 570, 34 Atl. 856; Gulf &c. R. Co. v. Younger, 90 Tex. 387, 38 S. W. 11, 21; 3 Elliott Ev. § 2019. See also Thomas v. East Tennessee &c. R. Co., 63 Fed. 420; St. Louis &c. R. Co. v. Cleare, 76 Ark. 377, 88 S. W. 995; Chicago &c. R. Co. v. Lagerkrans, 65 Nebr. 566, 91 N. W. 358.

[55] St. Louis &c. R. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472; Stahler v. Philadelphia &c. R. Co., 199 Pa. St. 383, 49 Atl. 273, 85 Am. St. 791; Clune v. Ristine, 94 Fed. 745. See also Terry v. Jewett, 78 N. Y. 338; Boswell v. Barnhardt, 96 Ga. 521, 23 S. E. 414. But compare San Antonio &c. R. Co. v. Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. 87, 24 L. R. A. 637. See Brown v. Southern R. Co., 65 S. Car. 260, 43 S. E. 794.

[56] Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Linden v. Anchor &c. Co., 20 Utah 134, 58 Pac. 355. See also Pittsburgh &c. R. Co. v. Brown, 178 Ind. 11, 97 N. E. 145; Hutchinson v. West Jersey &c. R. Co., 170 Fed. 615. But compare Louisville &c. R. Co. v. Simrall, 31 Ky. L. 1269, 104 S. W. 1011; Dean v. Oregon R. &c. Co., 44 Wash. 564, 87 Pac. 824.

[57] St. Joseph &c. R. Co. v. Wheeler, 35 Kans. 185, 10 Pac. 461. See also to the effect that it is a defense. Kanton v. Kelly, 65 Wash. 614, 121 Pac. 833. But compare Matlock v. Williamsville &c. R. Co., 198 Mo. 495, 95 S. W. 849, 115 Am. St. 481.

[58] Wright v. Crawfordsville, 142 Ind. 636, 42 N. E. 227; Nashville

§ 2070 (1378c). Release executed in one state and death in another, where such release is prohibited.—The subject of releases and contracts attempting to relieve a railroad company from liability for its negligence has already been considered, and will be further considered, in connection with relief departments and the acceptance of benefits, in the next chapter. But a recent case presents a peculiar phase of the subject that seems to demand consideration here. The constitution of Wyoming[59] provides that any contract or agreement with any employe waiving any right to recover damages for causing death or injury of any employe shall be void, and that it shall be unlawful for any corporation to require of an employe any contract whereby the corporation shall be released from liability on account of personal injuries received by the employe by reason of the negligence of the corporation or the employes thereof, and that such contracts shall be void. It appeared, in an action brought in Utah, that at the time plaintiff's intestate executed in this state a release of liability to an express company of both itself and defendant railroad company by both of whom the intestate was employed part of his services was to be performed in Wyoming, and the injuries having been inflicted while intestate was engaged in the performance of those services in Wyoming, the court held that the release was to be deemed a contract of that state, and as such was void.[60] It was also held that even in the absence of such a constitutional or statutory provision the contract was void as against public policy.[61] It has also been held that a re-

&c. R. Co. v. Prince, 2 Heisk. (Tenn.) 580. See also Central of Ga. R. Co. v. Alexander, 144 Ala. 257, 40 So. 424; Knoll v. Chicago &c. R. Co., 150 Ill. App. 438; Disbrow v. Ulster, 6 Sad. (Pa.) 33. 8 Atl. 912; Standlee v. St. Louis &c. R. Co., 25 Tex. Civ. App. 340, 60 S. W. 781.

[59] Art. 10, § 4, and Art. 19, § 1.

[60] Stone v. Union Pac. R. Co., 32 Utah 185, 89 Pac. 715. Compare Hamilton v. Chicago &c. R. Co., 145 Iowa 431, 124 N. W. 363.

[61] The court distinguished Northern Pac. R. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. ed. 513; Boering v. Chesapeake Beach R. Co., 193 U. S. 442, 24 Sup. Ct. 515, 48 L. ed. 742; Quimby v. Boston &c. R., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, and Muldoon v. Seattle R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901; Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791; Baltimore & Ohio R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed.

lease for wrongful death which occurred in the state of domicil, made by an administrator appointed in another state and without consent of the widow or next of kin, is not a bar to an action by the domiciliary administrator for the death.[62]

560; Pittsburgh &c. R. v. Mahony, 148 Ind. 196, 46 N. E. 917; Louisville &c. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348, and Peterson v. Chicago &c. R. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. 879, and Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633; and said: "In none of the cited cases did the relation of master and servant exist between the railway company and the person injured or killed, and for whose injury damages were claimed; nor was such person in any particular performing duties or services for it. Here, by the admission in the pleading, as well as by the evidence, it is shown that the deceased was not only an employe of the express company, but that he was also an employe of the defendant railway company. The relation of master and servant existed between him and the defendant. The decided weight of authority in this country sustains the proposition that a contract whereby the employe agrees in advance to relieve his employer from liability for injuries resulting from the latter's negligence, or that of his other employes, when he is by the law of the jurisdiction responsible for their negligence, is void as against public policy. Johnston v. Fargo, 184 N. Y. 379, 77 N. E. 388; Tarbell v. Rutland Rd., 73 Vt. 347, 51 Atl. 6; Lake Shore &c. R. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; Richmond R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. 245; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Willis v. Grand Trunk &c. R. Co., 62 Maine 488; Johnson v. Richmond R. Co., 86 Va. 975, 11 S. E. 829; Kansas R. Co. v. Peavy, 29 Kans. 169, 44 Am. Rep. 630; Roesner v. Hermann, 8 Fed. 782; Chicago Coal Co. v. Peterson, 39 Ill. App. 114. If the defendant could not have directly entered into a contract so as to relieve itself from the consequences of such negligence, it can not avail itself of such a contract made for its benefit by some third party." Compare also Cottrell v. Michigan &c. Trac. Co., 184 Mich. 221, 150 N. W. 857.

[62] Pisano v. B. M. &c. Shanly Co., 66 N. J. L. 1, 48 Atl. 618. But a settlement by the domiciliary administrator for the death of one temporarily in another state, made at the domicile of the negligent person in a third state, without notice of an ancillary administrator, or the institution of any action by him, has been held to bar such action notwithstanding the statute of the state where death occurred, provided that an action for death must be brought by the executor or administrator qualified by a court of such state. Compton's Admr. v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20, L. R. A. 1918D, 666.

CHAPTER LXIII

RELIEF DEPARTMENTS AND HOSPITALS

Sec.
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§ 2075 (1379). Power of railroad company to establish relief department.—Many railroad companies have recently established voluntary relief departments for the accumulation and management of a relief fund out of which definite amounts are to be paid to the employes, who voluntarily become members and contribute thereto, in case of accident or sickness, or to their relatives or other designated beneficiaries in case of their death. In some instances the railroad company takes entire charge of the fund, guarantees the fulfillment of its obligations, and makes the relief department a regular department of its service. It seems

to have been assumed in several cases that this is within the express or implied powers of a railroad company, but there are comparatively few cases in which this phase of the subject has been considered. In one case the court held that, as the charter of the company was not before it, there was no way of telling whether the company had power to establish and conduct such a department or not, but it could not presume, in the absence of any evidence, that it was ultra vires.[1] Much, of course, may depend upon the charter of the particular company and the scheme or plan of the relief association or department, but, as the company is benefited as well as the employes and the public, and as the matter is so intimately connected with the operation of the road, we think that the express powers usually granted to railroad companies carry with them the implied power to establish such departments or contribute to such associations within proper limits.[2] At all events, one who has voluntarily become a member and received the benefits cannot well question the legal-

[1] Chicago &c. R. Co. v. Bell, 44 Nebr. 44, 62 N. W. 314. The scheme or plan of the particular relief department in question is fully stated in the opinion in this case.

[2] In Beck v. Pennsylvania R. Co., 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. 210, it is said: "A contract by which an employe permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employes is provided, and by which the employer undertakes to manage the fund and furnish the agreed on relief, is . . . within the implied power of the employer, if a corporation. On the part of the employer, such a scheme may be deemed likely to increase efficiency of the force it employs, and on the part of the employe it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not ultra vires." It is also held in the same case that it is not against public policy, nor lacking in mutuality or consideration, nor is it an insurance contract. To the same effect are Maine v. Chicago &c. R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315, 47 L. R. A. 131, 77 Am. St. 539 (citing text); and King v. Atlantic &c. R. Co., 157 N. Car. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450, 458, citing text and other cases. See also State v. Pittsburgh &c. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. 635; Harrison v. Alabama &c. R. Co., 144 Ala. 246, 40 So. 394.

ity of the association and repudiate his contract, upon that ground, after he has been injured and elected to take advantage of its provisions. But the Federal Employers' Liability Act, or a similar state statute, may invalidate the contract where such statute applies.[3]

§ 2076 (1380). Relief association not an insurance company.— In one case it is held that a relief association of a railroad company, in so far as its relief department is concerned, is an insurance company; that the member who has paid his premium is entitled to the benefits irrespective of his relation to the railroad company as an employe, and that he cannot, therefore, be required to give up his right of action against the railroad company any more than if he had taken a policy in an entirely separate accident or casualty company.[4] The conclusion of the court in this case, however, is opposed to the almost unbroken current of authority. The reasoning also seems to be unsound. If it were sound it would clearly follow that the act of the railroad company in establishing a relief department was ultra vires, for a railroad company, with only the ordinary powers of such a corporation, cannot engage in an independent insurance business. But such a relief association or department is not an insurance company.[5]

[3] See Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; Wells v. Vandalia R. Co., 56 Ind. App. 211, 103 N. E. 360; Baltimore &c. R. Co. v. Miller, 183 Ind. 323, 107 N. E. 545; Barden v. Atlantic &c. R. Co., 152 N. Car. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801; notes in 33 L. R. A. (N. S.) 706 and 38 L. R. A. (N. S.) 867. But where the relief society's membership was confined to certain railroad employes and the company contributed semi-annually as much as all assessments on members a by-law that half the sum insured should be forfeited if suit was brought against the company was held valid and not within the prohibition of the Federal Employers' Liability Act. Wilson v. Grand Trunk Ry. Ins. &c. Soc., 78 N. H. 210, 98 Atl. 478, Ann. Cas. 1918E, 1191. But compare Rodell v. Chicago Relief Dept., 118 Minn. 449, 137 N. W. 174.

[4] Miller v. Chicago &c. R. Co., 65 Fed. 305.

[5] Johnson v. Philadelphia &c. R. Co., 163 Pa. St. 127, 29 Atl. 854; Colaizzi v. Pennsylvania R. Co., 208 N. Y. 275, 101 N. E. 859; Donald v. Chicago &c. R. Co., 93 Iowa

§ 2077 (1381). **Effect of rule that company cannot contract against negligence.**—It is a general rule that an employer cannot contract in advance that he shall not be liable for his own negligence.[6] Doubtless this rule would, in most jurisdictions, prevent the enforcement by a railroad company of an unconditional contract by a member of a relief association to release the company or not to sue it if he should be injured thereafter by the negligence of the company. If the terms of the contract were such that the mere membership in the association and the right to receive benefits should of themselves release the company from all liability, or if the contract, rules and regulations of the relief association were such as to compel him to accept the benefits and release and discharge the company, they would probably be void as against public policy.[7] This seems to be conceded in all cases upon the subject. But a contract giving the employe the option to do so, or providing that if he does do so voluntarily after the injury the railroad company shall be released, is a very different thing; and, as we shall show in the next section, the rule to which we have referred is not controlling where one accepts the benefits under such a contract.

§ 2078 (1382). **Contract that employe may elect to accept benefits and thereby release company not void as against public policy.**—There is no rule of public policy which forbids or discourages the settlement by compromise, in good faith, of a claim for damages after an injury has been inflicted. Such a contract

284, 61 N. W. 971, 33 L. R. A. 492. See also Commonwealth v. Equitable Assn., 137 Pa. St. 412, 18 Atl. 1112; Northwestern &c. Assn. v. Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. 810; Vickers v. Chicago &c. R. Co., 71 Fed. 139, 141, and authorities cited in last note to last preceding section.

[6] Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. ed. 872; Roesner v. Hermann, 8 Fed. 782; Richmond &c. R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Kansas Pac. R. Co. v. Peavey, 29 Kans. 169, 44 Am. Rep. 630 and note; Lake Shore Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833 and note; Johnson v. Richmond &c. R. Co., 86 Va. 975, 11 S. E. 829; 4 Thomp. Neg. (2d ed.) 3850.

[7] See Johnson v. Philadelphia &c. R. Co., 163 Pa. St. 127, 29 Atl. 854; Tarbell v. Rutland R. Co., 73 Vt. 347, 56 L. R. A. 656, 51 Atl. 6, 87 Am. St. 734.

as that to which we referred in the conclusion of the last section does not compel the employe to accept the benefit of the relief fund nor to release the company unless he does so. The contract, or transaction, is, in reality, not concluded until after the injury, and the company is not released until the relief fund is accepted. This completes the transaction, and the contract or release is no more against public policy than any other release or settlement by way of compromise after the injury is inflicted.[8] In-

[8] Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423; Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Johnson v. Philadelphia &c. R. Co., 163 Pa. St. 127, 29 Atl. 854; Chicago &c. R. Co. v. Bell, 44 Nebr. 44, 62 N. W. 314; Owens v. Baltimore &c. R. Co., 35 Fed. 715, 1 L. R. A. 75 and note; Otis v. Pennsylvania Co., 71 Fed. 136. In the last case, just cited, the court, in speaking of such a contract, said: "But upon a careful examination it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages. He knew, if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury." See also Hamilton v. St. Louis &c. R. Co., 118 Fed. 92; Eckman v. Chicago &c. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Fuller v. Baltimore &c. Assn., 67 Md. 433, 10 Atl. 237; Chicago &c. R. Co. v. Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. 456. Elaborate opinions reviewing many authorities to the same effect will be found in Atlantic Coast Line R.

deed, it has been held, though probably erroneously, that a statute prohibiting any such contract with a railroad company, and declaring that all such agreements and stipulations to surrender or waive any right to damages against any railroad company shall be void, is unconstitutional.[9]

§ 2079 (1383). **Consideration and mutuality of contract.**—By becoming a member of the relief department the employe receives benefits, if he chooses to accept them and release the company, not only where he is injured by the negligence of the company, but also where the company is guilty of no negligence, and, indeed, for mere sickness, with causing which the company has nothing to do. All this he may receive without the expense and uncertainty of litigation with the company. The railroad company's contribution to the association and its guaranty of its obligations also constitute a consideration moving to every member of the association. It cannot be said, therefore, that there is no consideration for the agreement of the employe, nor can it be said that there is no mutuality in the contract.[10] Indeed, under

Co. v. Beazley, 54 Fla. 311, 45 So. 761, and King v. Atlantic &c. R. Co., 157 N. Car. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450.

[9] Shaver v. Pennsylvania R. Co., 71 Fed. 931; Cox v. Pittsburgh &c. R. Co., 33 Ohio L. J. April, 1895, 1 Ohio N. P. 213, 2 Ohio Dec. 594. But many of the authorities already cited hold such a provision constitutional. See especially Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. 300; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419, and last note to first section of this chapter; Washington v. Atlantic &c. R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867; McGuire v. Chicago &c. R. Co., 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706. The ordinary relief fund contract is not a release within the prohibition of such a statute but is rather in the nature of a contract for choice between two sources of compensation. Pittsburgh &c. R. Co. v. Moore, 152 Ind. 346, 53 N. E. 290; Pittsburgh &c. R. Co. v. Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507.

[10] Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423; Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Chicago &c. R. Co. v. Bell, 44 Nebr. 44, 62 N. W. 314; Otis v. Pennsylvania Co., 71 Fed. 136; Pittsburgh &c. R. Co. v. Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507. See also Maine v. Chicago &c. R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315, 47 L. R. A. 131,

the old equity rule, which has been adopted in most of the states, a promise to one for the benefit of a third person may be enforced by the latter, no matter whether the consideration moves directly from him or not, and where the contract is completed by accepting benefits from the relief fund after the injury has been inflicted it would be a strange doctrine that would permit the employe to repudiate it upon the ground of want of consideration or mutuality.

§ 2080 (1384). Acceptance of benefits under such contract after injury releases the company.—It is well settled by the almost unruffled current of authority that the voluntary acceptance of benefits from a relief association, after an injury has been inflicted, under an agreement made upon becoming a member of the association that such acceptance shall operate as a release of the railroad company, or the acceptance of such benefits and the execution of a release in consideration thereof, does operate to release the company.[11] Indeed, it has been held that when an em-

77 Am. St. 539; Ringle v. Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. 628n; Hamilton v. St. Louis &c. R. Co., 118 Fed. 92; Day v. Atlantic &c. R. Co., 179 Fed. 30. And to same effect, but holding that receipt of only part of the benefits will not entirely bar an action at least unless expressly so agreed, are Petty v. Brunswick &c. R. Co., 109 Ga. 666, 35 S. E. 82, and King v. Atlantic &c. R. Co., 157 N. Car. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450. See also where master fails to comply with relief fund agreement. Pennsylvania &c. Co. v. Chapman, 220 Ill. 428, 77 N. E. 248.

[11] State v. Baltimore &c. R. Co., 36 Fed. 655; Otis v. Pennsylvania Co., 71 Fed. 136; Vickers v. Chicago &c. R. Co., 71 Fed. 139, 2 Am. Law. Reg. (N. S. 1895) 231; Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423; Spitze v. Baltimore &c. R. Co., 75 Md. 162, 23 Atl. 307, 48 Am. & Eng. R. Cas. 495; Ringle v. Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492; Graft v. Baltimore &c. R. Co. (Pa. St.), 8 Atl. 206; Clements v. London &c. Co., L. R. (1894) 2 Q. B. 482, 70 L. T. (N. S.) 531. See also Hemmick v. Baltimore &c. R. Co., 263 Ill. 241, 104 N. E. 1027; note in 11 L. R. A. (N. S.) 182, and supplementary note in 48 L. R. A. (N. S.) 440. Contra, Miller v. Chicago &c. R. Co., 65 Fed. 305. See also O'Neil v. Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688, 16 Am. & Eng. R. Cas. 107, which holds that although the employe signed an agreement releasing the company and received benefits from the re-

ploye of a railroad company becomes a member of a relief association, and, although at the time a minor, as a condition of membership and in consideration of the contributions and guaranty of the company, signs a contract by which he releases the company from liability for any accident which may happen to him while in its employment, he cannot recover against the company where both before and after bringing the action he receives money from the association on account of the injury and executes receipts releasing the company from all claims for damages on account of such injury.[12] In the last case the contract apparently attempted to take away all right of action against the company, and did not give the employe the option of accepting the benefits from the relief association or suing the company. He was also a minor at the time he executed it. For these reasons it could probably not have been enforced, but he voluntarily accepted the benefits after the injury and executed a release in full, presumably after becoming of age, and this barred him from recovery against the company. But the Federal Employers' Liability Act, where it applies, is held to avoid any such contract and to prevent the acceptance of benefits thereunder from operating as a bar to the recovery of damages against the company.[13] And it is also held that although such a contract is valid under the state law, yet, if the company and the employe were engaged in interstate commerce at the time of injury, the acceptance of benefits is not a bar to an action against a joint tort-feasor.[14] But the

lief fund if he was misled in so doing and supposed it to be a mere receipt he was not precluded from maintaining an action against the company and was not obliged to repay the benefit fund before bringing such action.

[12] Martin v. Baltimore &c. R. Co., 41 Fed. 125. See Griffiths v. Earl of Dudley, L. R. 9 Q. B. Div. 357.

[13] Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328 (Iowa Statute); Baltimore &c. R. Co. v. Miller, 183 Ind. 323, 107 N. E. 545; Rodell v. Relief Dept., 118 Minn. 449, 137 N. W. 174; Hogarty v. Phila. &c. Ry. Co., 245 Pa. 443, 91 Atl. 854. The statute, however, provides that the carrier may set off any sum it has contributed or paid to any insurance, relief benefit, or indemnity paid to the employe or person entitled thereto on account of the injury or death.

[14] Wagner v. Chicago &c. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

prohibition in Section 5 of the act is limited to the carrier's own employes and does not apply to a contract between a sleeping car company and its porter releasing and discharging all railroad companies over whose lines its cars might run.[15] And the statute does not apply so as to prevent contracts and settlements after the injury.[16]

§ 2081 (1385). Release of railroad company may be made a prerequisite to action against relief association.—It has been said that "even if the release of the railroad is good it is doubtful whether the provision that no benefits shall be paid if the company is sued is valid. That contract seems to be wholly without consideration. The employe, in case he sues the company, forfeits all contributions and the relief association receives the benefit of them without the slightest return."[17] But it has been held that a provision of the constitution of a railroad relief association that the railroad company shall be released before the association will pay the beneficiary any benefits on account of the accident, or, in other words, that he can not claim benefits out of the relief fund if he elects to sue the railroad company, is reasonable and valid.[18] It seems to us that such a provision or stipulation is founded upon a sufficient consideration and that one who voluntarily waives the benefits of the relief fund by electing to sue the railroad company has no reason to complain, and, at all events, where, as is generally the case, the company regularly contributes part of the money constituting the relief fund a provision that an employe or his representative who sues the company shall forfeit a proportionate part of the benefit of the relief fund is not invalid.[19]

[15] Robinson v. Baltimore & O. R. Co., 237 U. S. 84, Sup. Ct. 491, 59 L. ed. 849. See also Wells Fargo &c. Co. v. Taylor (U. S.), 41 Sup. Ct. 93.

[16] Ballenger v. Southern R. Co., 106 S. Car. 200, 90 S. E. 1019; Anderson v. Oregon &c. R. Co., 47 Utah 614, 155 Pac. 446.

[17] 2 Am. Law Reg. & Rev. (N. S. 1895) 234.

[18] Fuller v. Baltimore &c. Assn., 67 Md. 433, 10 Atl. 237.

[19] Wilson v. Grand Trunk Ry. Ins. &c. Society, 78 N. H. 210, 98 Atl. 478. Ann. Cas. 1918E, 1191 (holding that it is not void even under the Federal Employers' Liability Act). It would be unjust to permit a recovery of double compensation; and there is a valuable consideration for the contract and

§ 2082 (1386). Suit against company or compromise with it releases the relief association—Beneficiary barred.—In one of the cases referred to in the preceding section it appeared that a provision of the constitution of the relief association required that the person who was entitled to recover damages for the death of the employe should release the railroad company before the beneficiary should be entitled to any benefits from the relief association; that his mother had been designated as beneficiary, but that his wife and child were the persons legally entitled to recover damages for his death, and that such wife and child did not release the railroad company but brought suit against it and received a large sum of money from it by way of compromise. The court held that the mother could not maintain an action against the association for benefits.[20] So, in another recent case it was held that the beneficiary took only what the contract of membership provided she should take, and that a suit by the administrator of a member who was killed and the compromise thereof precluded the beneficiary from recovering upon the certificate where the contract of membership provided that if suit should be brought by his legal representative against the company and proceed to judgment or be compromised all claims upon the relief fund for benefits upon account of death should be precluded.[21]

no good reason why the employe or his representative should be permitted to claim the benefits of the contract and at the same time repudiate its burdens.

[20] Fuller v. Baltimore &c. Assn., 67 Md. 433, 10 Atl. 237. This has been criticised as "rank injustice." 1 Jaggard Torts, 313, note 60, quoting from 2 Am. L. Reg. & Rev. (N. S. 1895) 234. The decision, however, while it may be close to the line, is not so clearly erroneous as such a criticism would indicate or imply. Compare, however, Beylot v. Atlantic &c. R. Co., 95 S. Car. 210, 78 S. E. 871; and see Rodell v. Relief Dept., 118 Minn. 449, 137 N. W. 174.

[21] Donald v. Chicago &c. R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492. See also Chicago &c. R. Co. v. Healy, 76 Nebr. 783, 107 N. W. 1005, 111 N. E. 598, 10 L. R. A. (N. S.) 198n, 124 Am. St. 830. But compare Chicago &c. R. Co. v. Olson, 70 Nebr. 831, 97 N. W. 831. See also to effect that one who has recovered judgment against the company can not recover benefits from the relief department. Koeller v. Chicago &c. R. Co., 88 Nebr. 712, 130 N. W. 420, 48 L. R. A. (N. S.) 440. And

§ 2083 (1387). Acceptance of benefits by widow or child—When a bar to action against the company.—In most of the states are found statutes, based upon Lord Campbell's Act, which provide that in case of death by the wrongful act of another, the personal representative of the deceased may maintain an action for the benefit of the widow and children or next of kin. We suppose, that, in accordance with the principles already stated, the acceptance of benefits from a relief association under an agreement that the railroad company shall be released will prevent the recovery of damages for the benefit of the particular person who accepts such relief and executes a release of the railroad company after the injury. But the acceptance by the widow of benefits from the relief fund and the release by her of all claims against the company will not necessarily prevent her from maintaining an action as administratrix against the company for the benefit of the children.[22] Where, however, the widow, who was also administratrix, accepted the benefits from the relief fund, and signed the release both as widow and as administratrix, it was held that it constituted, prima facie at least, a bar not only to her claim against the company as widow, but also to a recovery for the benefit of the children.[23] So, where the railroad company failed to comply with its relief fund agreement with an injured employe, it was held that the employe might sue the railroad company for damages for his injury, and the company could not set up the relief fund agreement as a bar, although it would be entitled to credit for the amount paid and accepted from the relief fund.[24]

compare Sturgiss v. Atlantic &c. R. Co., 80 S. Car. 167, 60 S. E. 939.

[22] Chicago &c. R. Co. v. Wymore, 40 Nebr. 645, 58 N. W. 1120. See and compare Oyster v. Burlington &c. Co., 65 Nebr. 789, 91 N. W. 69, 59 L. R. A. 291.

[23] Pittsburgh &c. Ry. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034; also Gipe v. Pittsburgh &c. R. Co., 41 Ind. App. 156, 82 N. E. 471; Walters v. Chicago &c. R. Co., 74 Nebr. 551, 104 N. W. 1066. But compare Mesker v. Bishop, 56 Ind. App. 455, 103 N. E. 492, 105 N. E. 644.

[24] Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248. See also King v. Atlantic &c. R. Co., 157 N. Car. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450.

§ 2084 (1387a). **Effect of release or acceptance of benefits in only one capacity—Recent Nebraska case.**—Since the last two preceding sections were originally written and printed the Supreme Court of Nebraska[25] has withdrawn its opinion in one of the cases cited, vacated its former judgment and affirmed the judgment of the trial court, at the same time overruling another decision. The syllabus, prepared by the court, in the case referred to[26] is as follows: "Under a contract of membership in the Relief Department of the Chicago, Burlington & Quincy Railroad Company, which provided that the receipt of benefits by the beneficiary should bar all actions for damages arising from the death of the member, the beneficiary, after receiving the benefit provided for in the certificate to membership, cannot maintain an action to recover damages for herself caused by such death; but the receipt of such benefit will not bar her action as administratrix of the estate of the deceased for the benefit of her minor children. The provision, in a contract of membership in the Relief Department, that 'if any suit at law shall be brought against said company for damages arising from or growing out of' the death of the member, the benefit otherwise payable shall thereby be forfeited, is against public policy, and will not be enforced."[27]

§ 2085. **Agreements to resort to relief department tribunal—Ousting jurisdiction of courts.**—In some instances it is provided in the rules of the relief department or contract that all claims of members or their representatives or beneficiaries shall be submitted to a tribunal of the relief department, whose decision shall be final, and this has given rise to the question as to the validity

[25] In Chicago &c. R. Co. v. Healy, 76 Nebr. 783, 111 N. W. 598, 10 L. R. A. (N. S.) 198n, 124 Am. St. 830, vacating judgment and decision in 107 N. W. 1005, and overruling Walters v. Chicago &c. R. Co., 74 Nebr. 551, 104 N. W. 1066, so far as in conflict.

[26] Chicago &c. R. Co. v. Healy, 76 Nebr. 783, 111 N. W. 598, 10 L. R. A. (N. S.) 198n, 124 Am. St. 830, reviewing the earlier Nebraska cases upon the subject. But compare Pittsburgh &c. R. Co. v. Cipe, 160 Ind. 360, 65 N. E. 1034.

[27] But this case is explained and apparently qualified in the still more recent case of Koeller v. Chicago &c. R. Co., 88 Nebr. 712, 130 N. W. 420, 48 L. R. A. (N. S.) 440.

of such a contract or rule and whether the jurisdiction of the courts can be ousted in this way. It is the general rule supported by the right of authority in benefit association cases that, while resort may be required to be made to the tribunal of the association in the first instance, the decision of such a tribunal can not be made conclusive, so as to oust the jurisdiction of the courts.[28] But it is held in several recent cases that, in the absence of fraud or the like, the decision of the relief department may be made conclusive so as to prevent a resort to the courts.[29]

§ 2086 (1388). **Hospitals and medical attendance.**—Some railroad companies, instead of maintaining a relief department from which benefits are paid, voluntarily and gratuitously furnish medical and surgical attendance or maintain or contribute to hospitals in which an injured employe may be treated without charge. It is a general rule that if there is no negligence in selecting the surgeon, physician or other attendants, those who furnish them or those who maintain and furnish the hospital accommodations out of charity and not for profit are not liable for the malpractice or negligence of the physician or attendant.[30]

[28] 1 Elliott Cont. §§ 725-730; note to Kelly v. Trimont Lodge, 154 N. Car. 97, 69 S. E. 764, in 52 L. R. A. (N. S.) 823, 824, and numerous cases there cited. But as will be seen from the authorities their reviewed there is much conflict upon the subject.

[29] Pennsylvania Co. v. Reager, 152 Ky. 824, 154 S. W. 412, 52 L. R. A. (N. S.) 841, Ann. Cas. 1915B, 312n; Nelson v. Atlantic &c. R. Co., 157 N. Car. 194, 72 S. E. 998, 52 L. R. A. (N. S.) 829. But compare Baltimore &c. R. Co. v. Stankard, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. 745. And see Chicago &c. R. Co. v. Olson, 70 Nebr. 559, 97 N. W. 831, 99 N. W. 847.

[30] Secord v. St. Paul &c. R. Co., 18 Fed. 221; Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L. R. A. 581; Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; McDonald v. Massachusetts &c. Hospital, 120 Mass. 432, 21 Am. Rep. 529; Van Tassell v. Manhattan &c. Hospital, 60 Hun 585, 15 N. Y. S. 620 and note; Laubheim v. De Koninglyke &c., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. 815; Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 15 Atl. 553, 1 L. R. A. 417; Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. "The Liability of Charitable Corporations for the Torts of their Employes," 35 Cent. L. J. 125. See also 3 Am. L. Reg. & Rev. (N. S.) 185. Thus, in the case first cited it is said: "If one undertakes to

And even if a railroad company is morally obliged to furnish such attendance it is not liable on this ground if it does so and uses due care in the selection of a competent surgeon or physi-

treat such patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skilfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of respondeat superior has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation or pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of respondeat superior no longer applies, because, by fair implication, he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skilful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities, or in dispensing the charitable gifts of others intrusted to them to administer. One reason why corporations and individuals conducting hospitals supported by charitable endowments and contributions, and operated to heal the sick and injured, but not for profit, are not liable for the negligence of their employes, is, that the moneys in their hands constitute a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants. Moreover, the corporations or individuals that administer such trust must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They can not direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. . . . And, finally, the patient is not required to accept the proffered accommodations and attendance. They are but freely offered to him. He may refuse to accept them, and seek other physicians and other accommodations." But compare Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4, L. R. A. 1915D, 1167. In Illinois Cent. R. Co. v. Buchanan, 27 Ky. L. 1215, 88 S. W. 312, where the relief hospital was a separate corporation, it was held that the railroad company was not liable for the negligence of the hospital directors or attendants. See also Atlantic Coast Line R. Co. v. Whitney, 62 Fla. 124, 56 So. 937; Guy v. Lanark Fuel Co., 72 W. Va. 728, 79 S. E. 941, 48 L. R. A. (N. S.) 536; note to The Kenilworth, 144 Fed. 376, 4 L. R. A. (N. S.) 49.

cian.[31] Many of the courts apply this rule even where a relief department is maintained and supported in part by contributions or sums taken out of the wages of employes.[32]

§ 2087 (1389). When company is liable for negligence of surgeon in its hospital.—Even a gratuitous bailee, however, must exercise some care, and the failure to exercise such reasonable care as the nature of the thing bailed and the circumstances of the case require, may be such negligence as to render the bailee liable in damages.[33] If, therefore, a railroad company voluntarily undertakes to care for an injured employe who can not help himself, it may be held liable for negligence in its own treatment of him, or in knowingly or carelessly selecting an incompetent surgeon or physician to treat him. This is certainly true where it takes him to a hospital which it maintains with funds deducted out of the wages of the injured man and other employes, and he

[31] Atchison &c. R. Co. v. Zeiler, 54 Kans. 340, 38 Pac. 282; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313; South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638; Quinn v. Kansas City &c. R. Co., 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. 767. See also Pierce v. Union Pac. R. Co., 66 Fed. 44; Pearson v. Arkansas &c. R. Co., 106 Ark. 442, 153 S. W. 595; Eighmy v. Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296; Maine v. Chicago &c. R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; O'Brien v. Cunard &c. Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Chicago &c. R. Co. v. Howard, 45 Nebr. 570, 63 N. W. 872; Laubheim v. De Koninglyke N. S. Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. 815; Allan v. State &c. Co., 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. 556; Southern &c. R. Co. v. Mauldin, 19 Tex. Civ. App. 166, 46 S. W. 650; Williams v. Union Pac. R. Co., 20 Wyo. 392, 124 Pac. 505.

[32] See authorities in last two preceding notes; also Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L. R. A. 581; Maine v. Chicago &c. R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; Barden v. Atlantic &c. R. Co., 152 N. Car. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801; Texas &c. R. Co. v. Zumwalt, 103 Tex. 603, 132 S. W. 113, 30 L. R. A. (N. S.) 1026n.

[33] See Steamboat New World v. King, 16 How. (U. S.) 469, 470, 14 L. ed. 1019; Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 502; Tracy v. Wood, 3 Mason (U. S.) 132; Milwaukee & St. Paul R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761; Coggs v. Bernard, 2 Ld. Raym. 909.

is there injured by the negligence of an incompetent physician in charge, whom the company has negligently selected to treat him.[34] And the contract or arrangement may be such, as where the company maintains a hospital for its own benefit and profit to which employes are required to contribute, that the company will be liable for negligence in treatment even though it uses ordinary care to select a competent physician or surgeon.[35]

§ 2088 (1390). When release of claim against company will not include claim for negligent treatment in hospital.—As a railroad company can not, as a general rule, contract in advance that it shall not be held liable for its own negligence, it may be argued with some degree of plausibility that it can not thus escape liability for negligence in selecting an incompetent physician to take charge of its hospital or treat its injured employes. But, if no duty rests upon the company to take care of an injured employe in any particular case, it would seem that if the employe chooses to accept the voluntary assistance of the company and, in consideration of the company's furnishing him with surgical or medical attendance at its own cost, agrees that he will take all risks of the competency of the particular physician or surgeon so furnished, and will not hold the company liable for any negligence of such physician or surgeon, the contract is a valid one and will prevent any recovery by the employe against the company on account of the negligence of such at-

[34] Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338, 32 Pac. 1012; Wabash R. Co. v. Kelley, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752. See also Union Pac. R. Co. v. Winterbotham, 52 Kans. 433, 34 Pac. 1052; Nations v. Ludington &c. Lumber Co., 133 La. 657, 63 So. 257, 48 L. R. A. (N. S.) 531, Ann. Cas. 1916B, 471n; Northern Cent. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545; Atchison &c. R. Co. v. Jones, 9 Nebr. 67, 2 N. W. 363; Texas &c. Co. v. Connaughton, 20 Tex. Civ. App. 642, 50 S. W. 173; 4 Thomp. Neg. (2d ed.) §§ 3841, 3842. So where there was unreasonable delay in transportation of injured contributor to relief fund from place of injury to hospital. Missouri &c. R. Co. v. Graves, 57 Tex. Civ. App. 395, 122 S. W. 458.

[35] Phillips v. St. Louis &c. R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. 786, 14 Ann. Cas. 742, and cases cited in opinion.

tendant.[36] A release of claims against a railroad company on account of specified personal injuries caused by the latter will not, however, include a claim for damages for other injuries caused by negligent treatment in the hospital maintained by the company, where the latter injuries were not known to either party at the time, although the release purported to cover all "claims and demands whatever" against the company "from the beginning of the world" to the date of its execution.[37]

[36] See Ohio &c. R. Co. v. Early, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546 and note; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83, 90, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313.

[37] Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L. R. A. 581.

CHAPTER LXIV

RAILROADS AS CARRIERS

Sec.

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§ 2095 (1391). Nature of duty as common carriers.—Railroads are instrumentalities of commerce, and in a limited sense railroad companies are public agents. They are not public agents in the sense that they can bind the public but they are public agents in the sense that they are usually created for the purpose of transporting goods and passengers, and thus in great part conducting the commerce of the country. This is a public service.[1] As we have said, they "are affected with a public interest," and for that reason the governmental control over them is much greater than over a purely private corporation. As the functions

[1] State v. Boston &c. R. Co., 25 Vt. 433; Newburyport &c. Co. v. Eastern R. Co., 23 Pick. (Mass.) 326; Worcester v. Western &c. R. Co., 4 Metc. (Mass.) 564; State v. Spokane St. Ry. Co., 19 Wash. 518, 53 Pac. 719, 720, 41 L. R. A. 515, 67 Am. St. 739. See also Newton v. New York &c. R. Co., 72 Conn. 420, 429, 44 Atl. 813; California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 346; Donovan v. Pennsylvania Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. ed. 192; post, § 2535.

of railroad companies in carrying goods and passengers are essentially public, they have no right to unjustly discriminate in favor of some citizens and against others, but under similar circumstances or conditions must treat all who seek transportation alike.[2]

§ 2096 (1392). Implied duties as carriers.—In accepting the grant of rights and franchises from the state a railroad corporation impliedly assumes the duty of a common carrier. The consideration for the grant is the undertaking of the corporation to impartially perform this public duty. The duty is in the true sense a public one and one which every member of the community has a right to demand that the corporation shall perform. The benefit to the community is the consideration for the im-

[2] Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 37 N. J. L. 531, 13 Am. Rep. 457, 18 Am. Rep. 754; Cumberland &c. R. Co.'s Appeal, 62 Pa. St. 218; Vincent v. Chicago &c. R. Co., 49 Ill. 33; Great Western &c. R. Co. v. Sutton, L. R., 4 H. L. 226. See also Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765; Tift v. Southern R. Co., 123 Fed. 789; State v. Atlantic &c. R. Co., 52 Fla. 646, 41 So. 705, 12 L. R. A. (N. S.) 506 and note reviewing cases; Great Western R. Co. v. Burns, 60 Ill. 284; Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320; Cook v. Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; People v. New York Cent. &c. R. Co., 28 Hun (N. Y.) 543; Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643 and note; post, §§ 2216, 2557. We are here treating only of the general nature of the duty. We have elsewhere treated of the right to make different rates under different circumstances and conditions. That different rates may be made where circumstances are unlike has been often held. See Eclipse &c. Co. v. Pontchartrain R. Co., 24 La. Ann. 1; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; Sargent v. Boston &c. R. Co., 115 Mass. 416; Stewart v. Erie &c. R. Co., 17 Minn. 372; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. 712; State v. Cincinnati &c. R. Co., 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319; Shipper v. Pennsylvania R. Co., 47 Pa. St. 338; Branley v. South Eastern R. Co., 12 C. B. (N. S.) 74, 104 E. C. L. 74; Nicholson v. Great Western R. Co., 5 C. B. (N. S.) 366, 94 E. C. L. 366; post § 2559. See also St. Louis &c. Ry. Co. v. State, 112 Ark. 147, 165 S. W. 251.

portant rights and franchises conferred upon the corporation by its charter. From the fact that the company is authorized to build, maintain and operate a commercial railroad may be inferred its duties, rights and obligations as a common carrier of goods and passengers, but authority to build and operate a railroad for the carriage of passengers only, as, for instance, in the case of a street railway, does not authorize the inference that there is an implied duty to carry goods.[3] The implied duty of an ordinary commercial railroad does not extend so far as to require all trains to carry passengers or all trains to carry goods, but, on the contrary, the company may, within reasonable limits, determine what trains shall transport passengers and what trains shall transport goods. Citizens have no right to demand that trains provided for carrying goods shall carry passengers, nor, on the other hand, that passenger trains shall carry goods.

[3] See Thomson-Houston &c. Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86; Wiggins Ferry Co. v. East St. Louis &c. R. Co., 107 Ill. 450. But it is held that it may be liable as such for so holding itself out and undertaking to do so. Levi v. Lynn &c. Ry., 11 Allen (Mass.) 300, 87 Am. Dec. 713. In Davis v. Button, 78 Cal. 247, 20 Pac. 545, it is held that an instruction that, if defendant was engaged in the business of transporting passengers for hire on a railroad operated by him, the law denominates him a "common carrier," is correct. See Palmer v. Grand Junction &c. R. Co., 4 M. & W. 749; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586; Richards v. London &c. R. Co., 7 C. B. 839; Crouch v. London &c. R. Co., 14 Com. B. 255, 23 L. J. C. P. 73; Houston &c. R. Co. v. Harn., 44 Tex. 628. Burbridge v. Kansas City C. R. Co., 36 Mo. App. 669, was an action for injuries to the person of a passenger on a street car, and the answer admitted that defendant was a street railroad corporation, duly organized and existing under general statutes of the state. Held, that this was in effect an admission that it was a common carrier of passengers. An allegation of a contract to carry, coupled with the averment and fact that defendant was a railroad corporation, is sufficient to show the character of the defendant as a common carrier. Kain v. Kansas City &c. R. Co., 29 Mo. App. 53. As to difference between common carrier and forwarder see Schloss v. Wood, 11 Colo. 287, 17 Pac. 910; Briggs v. Boston &c. R. Co., 88 Mass. 246, 83 Am. Dec. 626. The question as to whether a party in any given case is a common carrier is sometimes one of fact or of mixed law and fact for the jury. Avinger v. South Car. R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716, 35 Am. & Eng. R. Cas. 519; Elkins v. Boston &c. R. Co., 23 N. H. 275.

§ 2097 (1393). **Railroads as carriers—Generally.**—It is evident from what has been said that railroad companies conducting ordinary commercial railroads are always common carriers of goods, and as such ordinarily bound to accept property of the kind they undertake to carry, properly tendered,[4] although the statute or charter may not expressly impose that duty upon

[4] Southwestern R. Co. v. Webb, 48 Ala. 585; Mobile &c. R. Co. v. Williams, 54 Ala. 168; Contra Costa &c. R. Co. v. Moss, 23 Cal. 323; Fuller v. Naugatuck R. Co., 21 Conn. 556; Pennewill v. Cullen, 5 Harr. (Del.) 238; Chicago R. Co. v. Thompson, 19 Ill. 578; Lawrenceburgh &c. R. Co. v. Montgomery, 7 Ind. 474; Ohio &c. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Norway Plains Co. v. Boston &c. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Thomas v. Boston &c. R. Co., 10 Met. (Mass.) 472, 43 Am. Dec. 444; Finn v. Western R. Co., 112 Mass. 524, 17 Am. Rep. 124; Southern Ex. Co. v. Moon, 39 Miss. 822; Mississippi C. R. Co. v. Kennedy, 41 Miss. 671; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; Armentrout v. St. Louis &c. R. Co., 1 Mo. App. 158; Elkins v. Boston &c. R. Co., 23 N. H. 275; Murch v. Concord R. Co., 29 N. H. 9, 61 Am. Dec. 631; Rogers L. Works v. Erie &c. R. Co., 20 N. J. E. 379; Camden R. Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; Weed v. Saratoga &c. R. Co., 19 Wend. (N. Y.) 534; Root v. Great Western R. Co., 45 N. Y. 524; Scofield v. Railway Co., 43 Ohio St. 571, 54 Am. Rep. 846, 1 West. 112; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; Hubbard v. Harnden Ex. Co., 10 R. I. 244; Dill v. South Carolina R. Co., 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407; Piedmont M. Co. v. Columbia R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194; Avinger v. South Car. R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716, 35 Am. & Eng. R. Cas. 519; East Tennessee, etc. R. Co. v. Nelson, 1 Cold. (Tenn.) 272; Nashville &c. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; Nashville R. Co. v. Messino, 1 Sneed (Tenn.) 220; Houston &c. R. Co. v. Harn, 44 Tex. 628; Noyes v. Rutland &c. R. Co., 27 Vt. 110; Jones v. Western &c. R. Co., 27 Vt. 399, 65 Am. Dec. 206; Garton v. Bristol &c. R. Co., 1 B. & S. 112; Richards v. London etc. R. Co., 7 C. B. 839, 18 L. J. C. P. 251; Oxlade v. Northeastern R. Co., 9 C. B. N. S. 896; Crouch v. London &c. R. Co., 14 Com. B. 255, 23 L. J. C. P. 73; Pegler v. Monmouthshire R. Co., 30 L. J. Ex. 249, 6 Hurls. & N. 644; Parker v. Great Western R. Co., 7 Man. & G. 253; Palmer v. Grand J. R. Co., 4 Mees. & W. 749; Muschamp v. Lancaster R. Co., 8 M. & W. 421; Pickford v. Grand J. R., 12 M. & W. 766. See also Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. ed. 397; Atlantic &c. R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389.

them.[5] So, too, passengers who properly ask transportation must be carried, since the obligation to carry is always implied.[6] All who operate a railroad under the charter, be they private individuals,[7] receivers,[8] or trustees,[9] must perform this implied public duty. A company which has undertaken to carry in the usual way will not be relieved from the carrier's liability because its road is incomplete and not formally opened.[10] But a railroad company whose road is in process of construction and not yet opened or held out as open for business is not a common carrier.[11] And industrial, switching, belt and union or terminal

[5] "We suppose it is not necessary that the charter should provide in so many words that the railroad created by it shall be a common carrier. The authorities are numerous to the point, that such companies using cars for the purpose of carrying goods for all persons indifferently for hire, and whose custom and uniform practice is to do so, are common carriers and liable as such. There can be no doubt on this point." Chicago &c. R. Co. v. Thompson, 19 Ill. 578. See also In re Minneapolis &c. R. Co. v. Manitou Forest, 101 Minn. 132, 112 N. W. 13; Root v. Great Western R. Co., 45 N. Y. 524.

[6] We are here speaking only of the general duty to carry, and do not mean to be understood that persons not in a fit condition to be carried, as, for instance, persons with contagious diseases or the like, can compel a railroad company to carry them. See as to liability for breach of contract to furnish special train, Burrus v. Nevada &c. Ry., 38 Nev. 156, 145 Pac. 926, L. R. A. 1917D, 750.

[7] Davis v. Button, 78 Cal. 247, 20 Pac. 545.

[8] United States v. Ramsey, 197 Fed. 144, 42 L. R. A. (N. S.) 1031n; Paige v. Smith, 99 Mass. 395; Nichols v. Smith, 115 Mass. 332; Blumenthal v. Brainerd, 38 Vt. 402, 19 Am. Dec. 349. And a receiver may not refuse to receive from and deliver to a connecting road loaded or empty freight cars of that company because, by doing so, his own road may become involved in a strike of locomotive engineers, whose associates have "gone out" on such connecting road, and who are attempting to boycott it. Beers v. Wabash &c. R. Co., 34 Fed. 244, 35 Am. & Eng. R. Cas. 646.

[9] Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; Faulkner v. Hart, 44 N. Y. Sup. Ct. 471; Rogers v. Wheeler, 2 Lans. 486, affirmed in 43 N. Y. 598.

[10] Little Rock &c. R. Co. v. Glidewell, 39 Ark. 487.

[11] Evansville &c. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092; Menaugh v. Bedford &c. R. Co., 157 Ind. 20, 60 N. E. 694; McRae v. Canada &c. Ry. Co., Montreal L. R. 4. S. C. 186. See also Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369, 20 L. ed. 432; Wade v. Lutcher &c. Co., 74 Fed. 517, 33 L. R. A. 255; Bay v. Merrill &c.

railroad companies and the like are not always common carriers in the ordinary and full sense of the term.[12]

§ 2098 (1394). Carriage for other carriers.—There are many cases holding that railroad companies are bound to transport the cars of other companies, and while so transporting and in complete control of them are liable as common carriers for any injuries to them.[13] But, as we have heretofore seen, where there

Lumber Co., 211 Fed. 717. But compare Nashville &c. R. Co. v. Messino, 1 Sneed (Tenn.) 220.

[12] Wyman's Pub. Service Corp. § 177. See also Taenzer &c. Co. v. Chicago &c. R. Co., 170 Fed. 240; Straight Creek Coal &c. Co. v. Straight Creek Coal Min. Co., 135 Ky. 536, 122 S. W. 842; Texas &c. Ry. Co. v. Henson, 56 Tex. Civ. App. 468, 121 S. W. 1127; post, §§ 2103-2105. But some of them frequently are. Fleming v. Kansas City &c. R. Co., 89 Mo. App. 129; Kansas City &c. R. Co. v. Rosebrook &c. Grain Co. (Tex. Civ. App.), 114 S. W. 436; United States v. Sioux City Stock Yards Co., 162 Fed. 556; United States v. St. Joseph Stockyards Co., 181 Fed. 625. The right of the public to use the facilities of the railroad and to demand its service, rather than the extent of its business, is the criterion for determining whether it is a common carrier, and tap line railroads connecting timber lands and lumber mills with trunk line railroad, though owned by such timber and mill owners are common carriers of freight. United States v. Louisiana &c. R. Co., 234 U. S. 1, 34 Sup. Ct. 74, 58 L. ed. 1185, affirming Louisiana &c. R. Co. v. United States, 209 Fed. 244.

[13] Hannibal R. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; Atchison T. & S. F. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291, 16 Am. & Eng. R. Cas. 57; Missouri &c. R. Co. v. Chicago &c. R. Co., 25 Fed. 317, 23 Am. & Eng. R. Cas. 718; Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Peoria &c. R. Co. v. United States Co., 136 Ill. 643, 27 N. E. 59, 29 Am. Rep. 348, 49 Am. & Eng. R. Cas. 81; Vermont &c. R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785; New Jersey R. & I. Co. v. Pennsylvania R. Co., 27 N. J. L. 100; Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488. See also Terre Haute &c. R. Co. v. Chicago &c. R. Co., 150 Ill. 502, 37 N. E. 915; Chicago &c. R. Co. v. Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. 456; Louisville &c. R. Co. v. Central Stockyards Co. (Ky.), 97 S. W. 778; United States v. Brooklyn Eastern Dist. Terminal, 249 U. S. 296, 39 Sup. Ct. 283, 63 L. ed. 613. Railroad companies are, in many states, required by statute to receive and transport the cars of other companies when requested. Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep.

is a right to refuse to carry, a special contract may be made limiting the liability. There is, indeed, no liability as a common carrier where there is a right to enter into a contract such as makes the company a private carrier and a contract of that kind has been executed.[14] In the Express Cases,[15] it was held that,

605, 18 Am. & Eng. R. Cas. 506, 511, note; Rae v. Grand Trunk R. Co., 14 Fed. 401, 9 Am. & Eng. R. Cas. 470; Louisville &c. R. Co. v. Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260; Michigan Central R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791, 1 Am. & Eng. R. Cas. 101; Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980; Texas &c. R. Co. v. Carlton, 60 Tex. 397. 15 Am. & Eng. R. Cas. 350. See also Public Service Com. of Md. v. Northern Cent. R. Co., 122 Md. 355, 90 Atl. 105; Coleman v. Pennsylvania R. Co., 242 Pa. 304, 89 Atl. 87, 50 L. R. A. (N. S.) 432n, Ann. Cas. 1915B, 529n; Grand Trunk R. Co. v. Michigan R. R. Com., 231 U. S. 457, 34 Sup. Ct. 152, 58 L. ed. 310. A railroad company, having received loaded cars to be delivered to a consignee and returned when unloaded, was held liable as a common carrier for their safe return, and hence responsible for the loss of the cars by fire while in the yards of the consignee. East St. Louis &c. R. Co. v. Wabash &c. R. Co., 24 Ill. App. 279. This case was reversed in 123 Ill. 594, 15 N. E. 45, 32 Am. & Eng. R. Cas. 522, the court holding that when the cars were placed on the consignee's private track, they had reached their destination, and consequently the company's liability as an insurer had ceased, to be revived when the cars were unloaded and returned by the consignee. The court distinguishes this case from Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep. 605; Simms v. South Carolina R. Co., 26 S. Car. 490, 2 S. E. 486.

[14] Chicago &c. R. Co. v. Wallace, 56 Fed. 506, 30 L. R. A. 161; Peoria &c. R. Co. v. United States &c. Co., 136 Ill. 643, 27 N. E. 59; post, § 2101. See Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep. 605; Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. ed. 787.

[15] St. Louis, I. M. & S. R. Co. v. Southern Ex. Co., 117 U. S. 1 and 601, 6 Sup. Ct. 542, 29 L. ed. 791 and 805, 23 Am. & Eng. R. Cas. 545; Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Louisville &c. Ry. Co. v. Keefer, 146 Ind. 21, 26, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; Atlantic Exp. Co. v. Wilmington &c. R. Co., 111 N. Car. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. 805. It is held, in Sargent v. Boston etc. R. Co., 115 Mass. 416, that the conduct of an express business is within the corporate powers of a railroad company. The leading case, supra, overruled the following: Wells, Fargo & Co. v. Northern R. Co.,

while it was the duty of the railroad companies to carry express matter for the public, yet they can choose their own means for the carriage, provided, of course, there is reasonable promptness and security; and that the express companies do business under special contracts which admit them to the road as a privilege, not as a right.

§ 2099 (1395). Breaking bulk—Transfer of goods from cars of one company to cars of another company.—It is vigorously maintained by some of the courts, although there is conflict upon the subject, that a railroad company may be compelled to receive and transport goods in the cars of another company without compelling a breaking of bulk and the transfer of the goods from the cars in which they were originally loaded to the cars of a company over whose lines the goods must pass to reach their destination.[16] There is great force in the reasoning of the court in the cases referred to,[17] and it is difficult to successfully

23 Fed. 469, 18 Am. & Eng. R. Cas. 440; Southern Express Co. v. Memphis &c. R. Co., 2 McCrary (U. S.) 570; United States v. Memphis &c. R. Co., 6 Fed. 237; Wells, Fargo & Co. v. Oregon R. &c. Co., 8 Sawyer (U. S.) 600, 18 Fed. 517, 16 Am. & Eng. R. Cas. 71, 87. See also as to mail, Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. ed. 1236.

[16] Peoria &c. Co. v. Chicago &c. R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506; Burlington &c. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98, 45 Am. & Eng. R. Cas. 391, 404. See also Chicago &c. R. Co. v. Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. 456; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Louisville &c. R. Co. v. Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260; Thomas v. Missouri Pac. Ry. Co., 109 Mo. 187, 18 S. W. 980. See also Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. ed. 988. But compare Louisville & Nashville R. Co. v. Central Stock Yds. Co., 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441. In some of these cases it was required by statute, and the interstate commerce act as amended in 1906, and Transportation Act 1920 provide for through routing.

[17] In Burlington &c. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477, 45 Am. & Eng. R. Cas. 391, 404, it was said: "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk has been practiced so long as to be recognized as a course of business

controvert the conclusions asserted in those cases, but the question, if not controlled by Act of Congress or state statute, is one that admits of fair debate. The rule which those cases assert is, we venture to say, a reasonable one, and is one, which, if enforced, would promote the interests of commerce.[18] There is, at all events, reason for affirming that railroad companies as instruments of commerce and as public agents,[19] must haul cars of other companies and can not compel the breaking of bulk and the transfer of goods to their own cars. The consideration for the grant of the valuable franchises to railroad corporations is that, as instruments of commerce, they will promote the public good by transporting goods in such a mode as the interests of commerce require. It seems to us that the evolution and expansion of commerce is one of the things which railroad companies must take into account in accepting the franchises bestowed upon them and that they must yield to the demands of developments and progress. If there be no duty to haul the cars of another company and there is a right to compel the breaking of bulk and the transfer of goods, then a railroad company may compel the breaking of bulk although its road has a haul of no more than the tenth or one-hundredth part of a mile. So, it may, if there be no such duty, compel the breaking of bulk, although the expense of the transfer may be very great, and, if

of which we will take judicial notice." It was also said: "Surely a course of business so long pursued and so extensively prevailing, and demanded by the commerce of the company, can not, when recognized and required by statute, become so oppressive in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railway company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded, impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road." See generally Beers v. Wabash &c. R. Co., 34 Fed. 244, 35 Am. & Eng. R. Cas. 646, 649; Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. 730, 735; Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. 746, 750.

[18] Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 34 Sup. Ct. 592, 595, 58 L. ed. 988.

[19] In New England &c. Co. v. Maine &c. Co., 57 Maine 188, 2 Am. Rep. 31, the court said: "It is true that these railroad corporations are private, and, in the nature of their business, are subject to, and

there be no such duty, so it may compel a transfer, even though the transfer and the delay may destroy the property of the shipper. If there be no such duty, then a car starting from the Pacific coast destined to the Atlantic may be stopped and bulk broken as many times as there may be different lines of railroads composing the route. We find it difficult to believe that the law ever intended that any such consequences should result, although there is strong reason for the opposite opinion. The question is not as to the rights of railroad companies between themselves, as, for instance, the rate of freight that each shall receive, or the like, but the question is as to the right of persons to have their property transported without unnecessary delay and without injury, or liability to injury from the delay or from the transfer of the goods from the cars of one company to those of another company. It is no doubt true that a railroad company is not to be required to suffer a loss,[20] but if it is yielded a full compensation there seems to be much reason for holding that it can not compel bulk to be broken, and should haul cars of other companies.

§ 2100 (1395a). Breaking bulk—Prepayment of charges.—Some of the federal decisions assert a different doctrine from that declared in the cases in the state courts, to which reference is made in the last preceding section, for they affirm that one company can not be compelled to haul the cars of another company, but may refuse to haul such cars, and may require a trans-

bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed to that end." It was also said: "So far as their duty to serve the public is concerned they are not only common carriers, but public agents." See also Palmer v. Grand Junction R. Co., 4 M. & W. 749; Messenger v. Pennsylvania Co., 37 N. J. L. 531, 18 Am. Rep. 754; Messenger v. Pennsylvania Co., 36 N. J. 407, 13 Am. Rep. 457; Atlantic &c. R. Co. v. Laird, 58 Fed. 760.

[20] See Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441.

fer of the goods to its own cars,[21] and may also require that the goods be "re-billed" over its line.[22] The question is one of difficulty, and there is force in the reasoning of the federal courts, but there is also strength in the reasoning of the advocates of a different doctrine. It has also been held that a carrier is not obliged at common law to receive goods from a connecting carrier without prepayment of its charges, nor to extend credit or advance charges to one connecting carrier even though it does so to another.[23] But the general question as to whether a railroad company may be compelled by a railroad commission, given such authority by statute, to accept cars of other companies without unloading and reloading into its own cars, may be regarded as fairly well settled by recent decisions of the Supreme Court of the United States in the affirmative.[24] And, under Transportation Act 1920, there can be no doubt that a carrier in interstate commerce may be compelled to take a car through without breaking bulk and transfer to its own car.

[21] In some of the federal cases, if not in all, the question arose between the railroad companies and did not involve the right of an owner of goods to have them carried without breaking bulk. Much that is said in the opinion in one of the cases is mere dicta.

[22] Little Rock &c. R. Co. v. St. Louis &c. R. Co., 59 Fed. 400; Oregon &c. R. Co. v. Northern &c. R. Co., 51 Fed. 465, 61 Fed. 158. In the case last cited, Mr. Justice Field said: "There can be no usage founded in reason requiring the receiving company to transport the freight in the cars in which it is tendered where its own cars are not in use. The receiving company is not under any obligation to allow its own cars to remain idle in order to transport those of another company in such cases, that is, where it has sufficient cars for the purpose not in use, it may properly refuse to receive the freight unless it is transferred to them." In the case referred to, Deady, J., dissented, and, as it seems to us, his reasoning is conclusive. See also Kentucky &c. Co. v. Louisville &c. Co., 37 Fed. 567; McAlister v. Chicago &c. R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373; post, § 2568.

[23] Southern Ind. Exp. Co. v. United States Exp. Co., 88 Fed. 659, See also Gulf &c. R. Co. v. Miami &c. Co., 86 Fed. 407; Little Rock &c. R. Co. v. St. Louis &c. R. Co., 63 Fed. 775, 26 L. R. A. 192.

[24] Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. 592; Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194. See also the opinion of the Iowa Supreme Court in the first case above cited, reported in State v. Chicago &c. R. Co., 152 Iowa 317, 130 N. W. 802.

§ 2101 (1396). **Railroad companies as private carriers.**—Ordinarily the contract or duty to transport goods or passengers constitutes a railroad company a common or public carrier, but a railroad company may, by contract, undertake the duty of transporting goods or passengers in the capacity of a private carrier. Where, however, there is no contract express or implied providing that the transportation is undertaken in the capacity of a private carrier, the presumtion is that the duty was undertaken in the capacity of a public or common carrier. Where cars are furnished by the person with whom the company contracts under a special agreement, and the company has no control over the cars, the general rule is that its undertaking is that of a private carrier.[25] A common carrier may by contract in particular instances become a private carrier,[26] but a railroad company can

[25] Chicago &c. R. Co. v. Wallace, 66 Fed. 506, 30 L. R. A. 161; Robertson v. Old Colony &c. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482; Coup v. Wabash &c. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Forepaugh v. Delaware &c. R. Co., 128 Pa. St. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. 672. In several of these cases the railroad company was hauling circus cars under a special contract. But although a shipper furnishes a car or the like it has been held that the company is liable as a common carrier if it has full control. Mallery v. Tioga R., 39 Barb. (N. Y.) 488; Hannibal &c. R. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423. In Indianapolis Traction &c. Co. v. Lawson, 143 Fed. 834, 5 L. R. A. (N. S.) 721, a street car company undertook to give a convention of women a free ride over its lines in its cars controlled by its servants, and the court held that the company was bound to use at least ordinary care. It is stated in the opinion that the trial court held that the company was a private carrier as to such persons, but was nevertheless liable for the failure to exercise ordinary care, and the court on appeal held that this was sufficiently liberal to the defendant, and even seemed inclined to view it as a public carrier, but did not decide that question. See also Keep v. Indianapolis &c. R. Co., 9 Fed. 625; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710; Davis v. Chesapeake &c. R. Co., 29 Ky. L. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458. But compare United States v. Brooklyn Eastern Dist. Terminal, 249 U. S. 296, 39 Sup. Ct. 283, 63 L. ed. 613.

[26] Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Chicago &c. R. Co. v. Wallace 66 Fed. 506, 30 L. R. A. 161. See generally as to when the undertaking is that of a private carrier. St. Louis, I. M. & S. R. Co. v. Southern Ex. Co., 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791; Liverpool

not escape the obligation which the law imposes upon it by insisting that a person who desires transportation for himself or goods shall accept the services of the company in the capacity of a private carrier, for where there is a duty to carry as a public or common carrier performance of that duty may be enforced. While a railroad company can not by contract or otherwise change the nature of its public duties or obligations it may, where it is not under a duty or obligation to the public, contract to perform service in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier.[27] Where a railroad company is sued in the capacity of a common carrier it has been held that the plaintiff will fail if the evidence shows that the undertaking to carry was in the capacity of a private carrier.[28] The rule asserted in the case referred to is but the

&c. R. Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Louisville &c. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710; Michigan &c. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Honeyman v. Oregon &c. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20; Piedmont &c. Co. v. Columbia &c. R. Co., 19 S. Car. 353. See also Louisville &c. R. Co. v. Du Bore, 120 Ga. 339, 47 S. E. 917; Wilson v. Atlantic &c. R., 129 Fed. 774. The case of Mallory v. Tioga etc. R. Co., 39 Barb. (N. Y.) 488, seems to be opposed to the weight of authority in some respects.

[27] Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Central &c. R. Co. v. Lampley, 76 Ala. 357; Russell v. Pittsburgh &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; Honeyman v. Oregon &c. R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20; Kimball v. Rutland &c. R. Co., 26 Vt. 247. See also Moore v. St. Louis &c. R. Co., 67 Ark. 389, 55 S. W. 161; Denver &c. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n, 12 Ann. Cas. 732; Chicago &c. R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 106 Am. St. 187, 1 L. R. A. (N. S.) 674; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710. But compare Davis v. Chesapeake &c. Ry. Co., 29 Ky. L. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458.

[28] In the case of Chicago &c. R. Co. v. Wallace, 66 Fed. 506, 30 L.

application to a particular instance, of the general doctrine that a plaintiff can not declare upon one theory and recover upon a different one. There is strong reason for applying the general rule to such an instance for the liability of a private carrier is essentially different from that of a common carrier; but it has recently been held that it is not error to permit a recovery in such a case where the defendant was not misled.[29]

§ 2102 (1397). Right to prescribe extent of liability where a railroad company undertakes service as a private carrier.—The considerations of public policy which are held to fetter the right to prescribe limitations upon the liability of a railroad carrier where it undertakes as a common or public carrier do not exist in cases where it has a right to contract to carry goods or passengers in the capacity of a private carrier, so that the company, where it undertakes to carry as a private carrier, may rightfully impose limitations that it could not impose if it were undertaking a duty resting upon it in its character of a common carrier.[30] The authorities warrant the conclusion that a private carrier may effectively stipulate that it shall not be liable for injuries resulting from negligence.[31] Where goods are received

R. A. 161, the declaration charged the defendant in the capacity of a common carrier but the evidence showed that the undertaking was in the capacity of a private carrier and it was held that there could be no recovery, the court saying, inter alia, that, "The plaintiff, if he recover, should recover according to his declaration. Kimball v. Rutland &c. R. Co., 26 Vt. 247, 62 Am. Dec. 567; White v. Great Western &c. R. Co., 2 C. B. (N. S.) 7."

[29] Indianapolis Traction &c. Co. v. Lawson, 143 Fed. 834, 5 L. R. A. (N. S.) 721.

[30] Chicago &c. R. Co. v. Wallace, 66 Fed. 506, 30 L. R. A. 161; Watson v. North British &c. R. Co., 3 Scotch Sess. Cas. (4th series) 637; Denver &c. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n, 12 Ann. Cas. 732, and authorities there cited. See generally as to the distinction between duties of railroad companies as public and private carriers. New Jersey &c. R. Co. v. Pennsylvania R. Co., 27 N. J. L. 100; Terre Haute &c. R. Co. v. Chicago &c. R. Co., 150 Ill. 502, 37 N. E. 915.

[31] Donovan v. Pennsylvania Co., 120 Fed. 215, 61 L. R. A. 140; Clough v. Grand Trunk &c. R. Co., 155 Fed. 81, 11 L. R. A. (N. S.) 446; Wilson v. Atlantic &c. R. Co., 129 Fed. 774, affirmed in 133 Fed. 1022; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710; Wells v. Steam Nav. Co., 2 N. Y. (2 Coms.) 204.

by a railroad company in the capacity of a private carrier it does not insure that they shall be safely carried and is only liable for an injury caused by its negligence, nor does the acceptance of goods for transportation impose upon it the obligations of a common carrier where they are received under an effective contract made in the capacity of a private carrier.[32]

§ 2103 (1398). Switching companies.—There is some confusion in the authorities as to the nature of the duties and liabilities of switching companies. In one of the Illinois cases it was held that a company which received the cars of another company is as to such car and the freight therein a common carrier,[33] but in subsequent cases there seems to be some modification of the general doctrine, or perhaps, some difference in the application of the doctrine.[34] In another case it was held that where

[32] Wells v. Steam Nav. Co., 2 N. Y. (2 Coms.) 204; Chicago &c. R. Co. v. Wallace, 66 Fed. 506, 30 L. R. A. 161; Wilson v. Atlantic &c. R. Co., 129 Fed. 774. See generally East India &c. R. Co. v. Pullan, 1 Strange 690; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; The Dan, 40 Fed. 691; Louisville &c. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; Pittsburg &c. R. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 40 L. R. A. 101, 62 Am. St. 503 and note; Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633; Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652; Coup v. Wabash &c. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; United States v. Power, 6 Mont. 271, 12 Pac. 639; Alexander v. Greene, 3 Hill (N. Y.) 9; Alexander v. Greene, 7 Hill (N. Y.) 533; Caton v. Rumney, 13 Wend. (N. Y.) 387; Brind v. Dale, 8 Carr. & P. 207, 34 Eng. Com. Law 692; Oakley v. Portsmouth &c. Packet Co., 11 Exch. 618; Collett v. London &c. Ry., 16 Q. B. 984. See also where railroad company was held to be a warehouseman rather than a common carrier. Atchison &c. R. Co. v. Homewood, 39 Okla. 179, 134 Pac. 856, 48 L. R. A. (N. S.) 990n.

[33] Peoria &c. R. Co. v. Chicago Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506. See also Texarkana &c. R. Co. v. Rosebrook &c. Grain Co., 52 Tex. Civ. App. 156, 114 S. W. 436.

[34] Peoria &c. R. Co. v. United States &c. Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. 348, reversing Peoria &c. R. Co. v. United States &c. R. Co., 28 Ill. App. 79, distinguishing Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep. 605, and citing Mallory v. Tioga &c. R. Co., 39 Barb. (N. Y.) 488; East St. Louis &c. R. Co. v. Wabash &c. R. Co., 123 Ill. 594,

a railroad company undertakes to switch a loaded car from the track of another company to its own track it thereby assumes the duty of a common carrier.[35] It is held by some of the courts that where a company is under no obligation to switch the cars of another company but undertakes to do so under a contract providing for the payment of a stipulated sum for performing the service it does not assume the duties and liabilities of a common carrier.[36]

§ 2104 (1399). Transfer companies.—Transfer companies operating in conjunction with railroad companies may, in some

15 N. E. 45; Missouri Pacific R. Co. v. Chicago &c. R. Co., 25 Fed. 317; Vermont &c. R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291, 16 Am. & Eng. R. Cas. 57. See also Texas &c. Ry. Co. v. Henson, 56 Tex. Civ. App. 468, 121 S. W. 1127.

[35] Missouri Pacific R. Co. v. Wichita &c. Co., 55 Kans. 525, 40 Pac. 899. The court distinguished the cases of Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Peoria &c. R. Co. v. United States &c. R. Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. 348; Independence &c. Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258, adhered to the ruling in Railroad Co. v. Maris, 16 Kans. 333, and cited with approval Scheu v. Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. 426; Pindell v. St. Louis &c. R. Co., 34 Mo. App. 675; North Pennsylvania R. Co. v. Commercial &c. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287. See as to company that does not own or operate transportation routes, but undertakes to transport goods. Kettenhofen v. Globe Transfer &c. Co., 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902n, Ann. Cas. 1914B, 776n.

[36] Kentucky &c. R. Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289. But a switching company was held to be a common carrier in Norfolk &c. Co. v. Commonwealth, 103 Va. 289, 49 S. E. 39. See also United States v. Brooklyn Eastern Dist. Terminal, 249 U. S. 296, 39 Sup. Ct. 283, 63 L. ed. 613; United States v. Louisiana &c. R. Co. (Tap Line Cases), 234 U. S. 1, 34 Sup. Ct. 741, 58 L. ed. 1185. Stockyards companies engaged in switching and charging the railroads therefor have been held common carriers. United States v. Union Stockyards & Transit Co., 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226; United States v. St. Joseph Stockyards Co., 181 Fed. 625; State ex rel. Dawson v. Kansas City Stockyards Co., 94 Kans. 96, 145 Pac. 831, L. R. A. 1918B, 681. See also Fesser v. Chicago &c. R. Co., 267 Ill. 418, 108 N. E. 709; State ex rel. Winnett v. Union Stockyards Co., 81 Nebr. 67, 115 N. W. 627.

instances, be regarded as connecting carriers and as such be subject to the liabilities of common carriers.[37] Whether a transfer company is or is not a connecting carrier has been held to be a question of fact for the jury.[38] We suppose, however, that where there is a valid usage or custom by virtue of which transfers are made from one railroad carrier to another by a transfer company acting as an independent carrier the delivery to the transfer company by the initial carrier must, as a matter of law, be held to be a delivery to a connecting carrier. We can not see any valid reason why the conclusion just stated is not a sound one, for if there be a usage to transfer by means of an intermediate independent common carrier, whether by boat, railroad or otherwise, the shipper is bound to know that the initial carrier only undertakes, unless the contract otherwise provides, to carry by the usual route and in the usual mode. The distance to be traversed can not, as it seems to us, affect the question if it be true that usage sanctions or requires the services of an intermediate and independent carrier. If the transfer company simply acts as an agent of the initial carrier in transferring the goods, then the transfer company can not be justly regarded as a connecting carrier, nor can it be so considered where the initial carrier simply employs it for its own convenience. Ordinarily the question whether the transfer company was or was not an agent or employe of the initial carrier must be determined upon the facts of the particular case.[39]

[37] Parmelee v. McNulty, 19 Ill. 556. See also Verner v. Sweitzer, 32 Pa. St. 208; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 608, 65 N. E. 309; Bonce v. Dubuque St. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; La Porte v. New Orleans &c. Co., 42 La. Ann. 696, 7 So. 608; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Lloyd v. Haugh &c. Storage & Transfer Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188n; Kettenhofen v. Globe Transfer &c. Co., 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902n, Ann. Cas. 1914B, 776n.

[38] Missouri Pacific R. Co. v. Young, 25 Nebr. 651, 41 N. W. 646, citing Hooper v. Chicago &c. R. Co., 27 Wis. 81.

[39] In Nanson v. Jacob, 12 Mo. App. 125, it seems to be held that "truckmen" or transfer companies cannot be regarded as connecting

§ 2105 (1400). **Bridge companies.**—Corporations may be closely connected with railroad companies and may furnish such companies with the facilities for conducting their business and yet not be common carriers. The company to which goods are entrusted for carriage is ordinarily the carrier and not the corporation which supplies to the railroad company the means of discharging its duties as a common carrier of goods and passengers. Thus, a bridge company which owns no freight cars, but which solicits freight for railway companies that will furnish the cars, and merely transfers such cars over its bridge for the railway company furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars, is not a common carrier.[40]

§ 2106 (1401). **Express, dispatch and fast freight companies.**—Connected with the railroad service are many organizations, sometimes corporations and sometimes individuals (and they are sometimes in reality composed of several railroad companies), that engage in the transportation of goods as "fast freight lines," express companies and the like. Such organizations, whether incorporated or not, are often, in a limited sense, railroad carriers, and, in the strict sense, are common carriers.

carriers under any circumstances, but, as indicated in the text, we think this depends entirely upon the facts of the particular instance. See generally Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246. In Western &c. R. Co. v. Exposition, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, stress was placed upon the fact that all the compensation for carriage was received by the initial carrier. See also Chattock v. Bellamy, 64 L. J. Q. B. (N. S.) 250; Munks v. Jackson, 66 Fed. 571; Brown v. New York &c. R. Co., 75 Hun 355, 27 N. Y. S. 69.

[40] Kentucky &c. Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289, 2 Inters. Com. 351. The terminal facilities of such bridge company do not, in and of themselves, constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." A railway company which, by contract with the bridge company, acquires the right to the use of the bridge for its trains, is alone the common carrier as to all traffic thereon. See also Grigsby v. Chappell, 5 Rich. L. (S. Car.) 443. But compare ante, § 2103; West End Imp. Club v. Omaha &c. Ry. & Bridge Co., 17 I. C. C. 239.

A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier. This has been held the proper view as to express companies,[41] dispatch companies,[42] and fast freight

[41] Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. ed. 872; Pacific Ex. Co. v. Seibert, 44 Fed. 310; Southern Exp. Co. v. Crook, 44 Ala. 468; Overland Ex. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Baldwin v. American Ex. Co., 23 Ill. 197, 74 Am. Dec. 190; American Ex. Co. v. Baldwin, 26 Ill. 504, 79 Am. Dec. 389; American Ex. Co. v. Pinckney, 29 Ill. 392; Gulliver v. Adams Express Co., 38 Ill. 503; Lowell Wire Fence Co. v. Sargent, 8 Allen (Mass.) 189; Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68; Mather v. American Ex. Co., 15 Minn. 270, 2 Am. Rep. 122; Bardwell v. American Ex. Co., 35 Minn. 344, 28 N. W. 925; Sherman v. Wells, 28 Barb. (N. Y.) 403; Haslam v. Adams Ex. Co., 6 Bosw. (N. Y.) 235; Sweet v. Barney, 23 N. Y. 335; United States Ex. Co. v. Backman, 28 Ohio St. 144; Bennett v. Northern Ex. Co., 12 Ore. 49, 6 Pac. 160; Grogan v. Adams Ex. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Stadhecker v. Combs, 9 Rich. L. (S. Car.) 193; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; Southern Ex. Co. v. Glenn, 16 Lea (Tenn.) 472; note in 61 Am. St. 360.

[42] New Jersey S. N. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Bank of Kentucky v. Adams Ex. Co., 93 U. S. 174, 23 L. ed. 872; Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717, 18 Am. & Eng. R. Cas. 604; Merchants' D. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Merchants' D. Co. v. Bolles, 80 Ill. 473; Merchants' D. Co. v. Leysor, 89 Ill. 43; Merchants' D. Co. v. Joesting, 89 Ill. 152; Robinson v. Merchants' D. Co., 45 Iowa 470; Stewart v. Merchants' D. Co., 47 Iowa 229, 29 Am. Rep. 476; Wilde v. Merchants' D. Co., 47 Iowa 247, 29 Am. Rep. 479; J. H. Cownie Glove Co. v. Merchants' Dispatch &c. Co., 130 Iowa 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060n, 114 Am. St. 419; McFadden v. Missouri &c. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721, 30 Am. & Eng. R. Cas. 17; Russell v. Livingston, 19 Barb. (N. Y.) 346; Hersfield v. Adams, 19 Barb. (N. Y.) 577; Richards v. Westcott, 2 Bosw. (N. Y.) 589; Mercantile M. I. Co. v. Chase, 1 E. D. Smith (N. Y.) 115; Place v. Union Ex. Co., 2 Hilton (N. Y.) 19; United States Ex. Co. v. Backman, 28 Ohio St. 144; Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Baker v. Railroad Co., 10 Lea (Tenn.) 304; Louisville &c.

lines.[43] As elsewhere shown express companies, fast freight lines and the like are common carriers in all that the term implies. They can not contract for exemption from their own negligence nor for exemption from the negligence of the railroad companies from which their rights are derived. The courts take judicial knowledge of the course of business, and will not permit the rules governing carriers to be evaded by the formation of such companies and their intervention between the railroad company and the shipper. Neither the name adopted nor any mere matters of form can change the rule applicable to them since the courts give heed to the matters of substance rather than form.

§ 2107 (1401a). **Forwarders.**—A forwarder is one who takes charge of goods sent to him for shipment and ships or forwards them by suitable means to their destination, taking upon himself the expense of transportation. His compensation is solely for this service. He has no concern in the instrumentality chosen and no interest in the freight,[44] and is not an insurer. His duty under the law is to exercise ordinary diligence in forwarding the shipment by responsible carriers, and he is liable only for injuries resulting from the negligence of himself or his agents or employes.[45] But this character does not inhere in a corporation

R. Co. v. Mason, 11 Lea (Tenn.) 116, 16 Am. & Eng. R. Cas. 241; East Tenn. R. Co. v. Hale, 85 Tenn. 69, 1 S. W. 620, 27 Am. & Eng. R. Cas. 36; Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847, 35 Am. & Eng. R. Cas. 579; Railway Company v. Wynn, 88 Tenn. 320, 14 S. W. 311, 45 Am. & Eng. R. Cas. 312; Southern Ex. Co. v. McVeigh, 20 Grat. (Va.) 264; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226. The use of the term "forwarded" will not screen the Express Company from its common carrier's liability. Christenson v. American Ex. Co., 15 Minn. 270, 2 Am. Rep. 122; Read v. Spaulding, 5 Bosw. (N. Y.) 395; Southern Ex. Co. v. McVeigh, 20 Grat. (Va.) 264; Planters' Nat. Bank v. Adams Ex. Co., 93 U. S. 174, 23 L. ed. 872.

[43] Read v. Spaulding, 5 Bosw. (N. Y.) 395; post, § 2200. See also Kettenhofen v. Globe Transfer &c. Co., 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902n, Ann. Cas. 1914B, 776n.

[44] Roberts v. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; Teall v. Sears, 9 Barb. (N. Y.) 317.

[45] Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Brown v. Denison, 2 Wend. (N. Y.) 593.

doing a transportation business in the cars and over tracks belonging to another corporation.[46] Under these rules express companies are carriers and not forwarders, though they style themselves in their receipts as "express forwarders," and agree to "forward" the goods.[47] It has been held that an agreement to "forward" goods to a place designated for an agreed amount for the whole distance is not a forwarding contract, but one for transportation, and hence the carrier will be liable for the safe delivery of the shipment—subject to the exceptions applicable to all carriers—at such destination though it is beyond its own terminus.[48]

§ 2108 (1401b). **Carrier as agent or factor.**—The carrier is sometimes entrusted with the duty of transporting and selling the shipment and returning the proceeds of the sale to the shipper. The authorities generally regard the carrier in the performance of the latter duty—that of returning the proceeds—as an agent or factor, and liable only for a failure to use such diligence and care as ordinarily prudent men would exercise with reference to their own affairs under similar circumstances.[49] This rule has been modified by custom in some parts of the country and there the carrier is held liable as a common carrier throughout the transaction.[50]

§ 2109 (1402). **Street railway companies.**—There is a difference between ordinary street railways and commercial railroads, for street railways are not usually common carriers of goods,

[46] Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115.

[47] Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122; Regan v. Adams Express Co., 49 La. Ann. 1579, 22 So. 835.

[48] Krender v. Woolcott, 1 Hilt. (N. Y.) 223. See also for other so-called forwarding companies held to be common carriers: Barre v. American Forwarding Co., 146 Ill. App. 388; Lee v. Fidelity &c. Storage Co., 51 Wash. 208, 98 Pac. 658; Garberson v. Trans-Continental Freight Co., 51 Wash. 213, 98 Pac. 612.

[49] Williams v. O'Daniels, 35 Tex. 542; Taylor v. Wells, 3 Watts (Pa.) 65; Stone v. Waitt, 31 Maine 409, 52 Am. Dec. 621.

[50] Harrington v. McShane, 2 Watts (Pa.) 443, 27 Am. Dec. 321; Kemp v. Coughtry, 11 Johns. (N. Y.) 107.

but they are carriers of passengers.[51] A company operating a line of railroad in a street may, of course, be constituted a common carrier in all that the term implies,[52] but street railway companies are usually not carriers of goods, for they are created, as a rule for a different purpose.[53] In their capacity of passenger carriers street railway companies are held to the exercise of the highest practicable degree of care.[54] The rule as to the degree of care required of such companies, and as to the presumption of negligence, is substantially the same as that which governs ordinary railroad carriers of passengers.[55] The company is, of

[51] Holly v. Atlanta &c. R. Co., 61 Ga. 215, 34 Am. Rep. 97; Citizens &c. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Citizens' &c. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014; Boikens v. New Orleans &c. R. Co., 48 La. Ann. 831, 19 So. 737; Spellman v. Lincoln &c. R. Co., 36 Nebr. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. 753; Cogswell v. West Street &c. R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500. See also Milwaukee Elec. Ry. v. Milwaukee, 87 Fed. 577; Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S. W. 565; Barker v. Central Park &c. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. 626; ante, § 1450. So are operators of "jitneys" and similar vehicles for hire. Desser v. City of Wichita, 96 Kans. 820, 153 Pac. 1194. See also Ex parte Cardinal, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; Dickey v. Davis, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840n.

[52] Levi v. Lynn &c. R. Co., 11 Allen (Mass.) 300, 87 Am. Dec. 713.

[53] A carrier may be a carrier of passengers and not a carrier of goods, and if a carrier of passengers the service is a public one, or, as is sometimes said, quasi public. Thompson &c. Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86, 43 Alb. L. J. 48.

[54] Dudley v. Front Street &c. R. Co., 73 Fed. 128; Holly v. Atlanta &c. R. Co., 61 Ga. 215, 34 Am. Rep. 97; City &c. R. Co. v. Findley, 76 Ga. 311; Chicago &c. Co. v. Engel, 35 Ill. App. 490; Indiana Un. Trac. Co. v. Keiter, 175 Ind. 268, 92 N. E. 982; Bonce v. Dubuque &c. R. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Topeka &c. Co. v. Higgs, 38 Kans. 375, 16 Pac. 667, 5 Am. St. 754; Southern &c. R. Co. v. Walsh, 45 Kans. 653, 26 Pac. 45; Louisville &c. R. Co. v. Weams, 80 Ky. 420; Watson v. St. Paul &c. R. Co., 42 Minn. 46, 43 N. W. 904; Gilson v. Jackson &c. R. Co., 76 Mo. 282; Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167. Perhaps, in strictness, it is the kind or amount of care rather than the degree that the rule refers to, but it is usually stated as in the text.

[55] Feital v. Middlesex &c. R. Co., 109 Mass. 398, 12 Am. Rep. 720; Smith v. St. Paul &c. R. Co., 32

course, not liable unless it has been guilty of negligence,[56] but there is, as we have indicated, a class of cases in which, in one sense at least, the burden may be cast upon the company of showing that there was no negligence on its part. There must, it is obvious, be a difference in some respects between the duties of street railway companies to passengers and the duties of ordinary commercial railroads, notably so as to the place of getting on and alighting from the cars, for the members of the one class of companies have no direct control of the streets on which their tracks are laid, while those of the other class have the exclusive right to their tracks and the places of entering and alighting from trains.[57] This general subject, however, has been fully

Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Van Natta v. People's &c. R. Co., 133 Mo. 13, 34 S. W. 505; Spellman v. Lincoln &c. R. Co., 36 Nebr. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. 753; Black v. Third Ave. R. Co., 2 App. Div. 387, 37 N. Y. S. 830. See Birmingham &c. R. Co. v. Clay, 108 Ala. 233, 19 So. 309; Washington v. Spokane &c. R. Co., 13 Wash. 9, 42 Pac. 628. The rule that negligence must be the proximate cause of injury applies, of course, to actions against street railway companies. Chicago &c. R. Co. v. Bell, 1 Kans. App. 71, 41 Pac. 209; White v. West End &c. R. Co., 165 Mass. 522, 43 N. E. 298. As to what may be regarded as proximate cause, see Harper v. Philadelphia &c. Co., 175 Pa. St. 129, 34 Atl. 356. The general doctrine that contributory negligence will bar a recovery prevails in actions against street railway companies. Quincy &c. R. Co. v. Schulte, 71 Fed. 487; Butler v. Pittsburgh &c. R. Co., 139 Pa. St. 195, 21 Atl. 500; Ashbrook v. Frederick &c. R. Co., 18 Mo. App. 290. There is, however, some difference made in the application of the rule as between ordinary commercial railroads and street railways, insomuch as what would be contributory negligence in the one class of cases may not be so in the other class.

[56] Bradley v. Second Ave. &c. R. Co., 90 Hun 419, 35 N. Y. S. 918.

[57] Conway v. Lewiston &c. R. Co., 87 Maine 283, 32 Atl. 901. But see Louisville &c. Traction Co. v. Walker, 177 Ind. 38, 97 N. E. 151. So, on the other hand, while a street car conductor is not usually required to know absolutely that a passenger is in the act of boarding or alighting before starting up the car after stopping for such purpose, he is required, at least in many jurisdictions, to use the highest or greatest care to see and know, and in this respect, perhaps, to do more than is usually required of an ordinary railroad conductor.

treated elsewhere.[58] So, the question as to whether sleeping car companies, or the like, are common carriers will be fully considered in another chapter.[59]

[58] Ante, chapter XLV.

[59] Post, chapter LXXVII. See also note in 21 L. R. A. 291; Elliott on Bailments § 290, et seq.

CHAPTER LXV

DELIVERY AND ACCEPTANCE

Sec.
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§ 2115 (1403). Liability begins with delivery.—A railroad company is responsible as a common carrier of things either wholly or not at all,[1] that is, "there is no divided duty of safekeeping and no apportionment in the event of a loss."[2] If it does not become completely liable as a common carrier then it can not be held in any respect to be liable in that capacity, although it may be liable in some other capacity, as, for instance, in that of a warehouseman. The responsibility begins with the completion of the delivery to it,[3] whether a bill of lading has or has

[1] Brind v. Dale, 8 Carr. & P. 207.

[2] St. Louis &c. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; London &c. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 494, 43 Am. St. 752, 61 Am. & Eng. R. Cas. 225.

[3] Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944; St. Louis &c. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; Illinois R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Aiken v. Chicago &c. R. Co., 68 Iowa 363, 27 N. W. 281; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; Mason v. Missouri R. Co., 25 Mo. App. 473; Rubens v. Ludgate Hill &c. Co., 65 Hun 625, 20 N. Y. S. 481; Cragin v. New York &c. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46.

not been issued at that time.[4] As a general rule, there is no liability as a common carrier until delivery,[5] but it is not always necessary that there should be actual delivery and express acceptance, for there may be constructive or implied delivery and acceptance or the matter may be determined very largely by contract or custom.[6] It has been held, however, that leaving goods on a dock near the carrier's boat, in accordance with the usual custom, will not render the carrier liable, in the absence

[4] Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Louisville &c. R. Co. v. McGuire, 79 Ala. 395; St. Louis &c. R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963, 55 Am. & Eng. R. Cas. 428; St. Louis &c. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; Pine Bluff &c. R. Co. v. McKenzie, 75 Ark. 100, 86 S. W. 834; Garner v. St. Louis &c. R. Co., 79 Ark. 353, 96 S. W. 187, 116 Am. St. 83; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Morrison Grain Co. v. Missouri Pac. R. Co., 182 Mo. App. 339, 170 S. W. 404. Although the statute provides for the commencement of the common carrier's liability with the issuance of the bill of lading, yet the company may become liable before if the goods have been actually delivered and accepted by it. East &c. R. Co. v. Hall, 64 Tex. 615. See also Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Keithley v. Lusk, 190 Mo. App. 458, 177 S. W. 756; International Watch Co. v. Delaware &c. R. Co., 80 N. J. L. 553, 78 Atl. 49; Davis v. Norfolk So. R. Co., 172 N. Car. 209, 90 S. E. 123; Anton Piano Co. v. Chicago &c. R. Co., 152 Wis. 156, 139 N. W. 743. But see Missouri Pac. R. Co. v. Douglas, 2 Tex. App. (Civil Cas.) 32, 16 Am. & Eng. R. Cas. 98.

[5] Southern Ex. Co. v. McVeigh, 20 Grat. (Va.) 264; Trnax v. Philadelphia &c. R. Co., 3 Houst. (Del.) 233; Grosvenor v. New York &c. R. Co., 39 N. Y. 34; Tower v. Utica &c. R. Co., 7 Hill (N. Y.) 47, 42 Am. Dec. 36.

[6] Constable v. National &c. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. ed. 903; Arthur v. Texas & P. R. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. ed. 590; Bennitt v. Guiding Star, 53 Fed. 936; Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Louisville &c. R. Co. v. Echols, 97 Ala. 556, 12 So. 304; Merriam v. Hartford &c. Co., 20 Conn. 354, 52 Am. Dec. 344 and note; New England &c. Co. v. Starin, 60 Conn. 369, 22 Atl. 953; Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296; Moses v. Boston &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Pacific Ex. v. Black, 8 Tex. Civ. App. 363, 27 S. W. 830. See also Georgia &c. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961; Yazoo &c. R. Co. v. Nichols &c. Co., 120 Miss. 690, 83 So. 5.

of express notice.[7] And it is said that while the liability of a carrier as such will begin with the receipt of goods into his own warehouse when the deposit is a mere accessory to the carriage and for the purpose of facilitating it, yet if they are not ready for immediate transportation and the carrier can not make immediate arrangements for their carriage until something further is done, or further directions given by the owner or consignor, the deposit must be considered in the meantime as for the convenience or accommodation of the latter, and the receiver, until some further change takes place, will be responsible only as a warehouseman.[8]

§ 2116 (1404). What constitutes complete delivery.—The general rule, as stated by Mr. Hutchinson,[9] is that the delivery to the carrier and his acceptance of the goods begins the instant he or his servants undertake to load them from the conveyance of another carrier upon his own and for that purpose have attached his tackle to them. "When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them in transitu, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him."[10] No

[7] Missouri &c. R. Co. v. Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975; Packard v. Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475 and note. See also Gary Bros. &c. v. Chicago &c. R. Co., 49 Mont. 524, 143 Pac. 955; Grosvenor v. New York Cent. R. Co., 39 N. Y. 34. But compare Ft. Worth &c. R. Co. v. Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

[8] See Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739; Dixon v. Central R. Co., 110 Ga. 173, 35 S. E. 369; Judson v. Western R. Corp., 4 Allen (Mass.) 520, 81 Am. Dec. 718. And compare also Chickasaw Cooperage Co. v. Yazoo &c. R. Co., 141 Ark. 71, 215 S. W. 897.

[9] Hutchinson Carriers (3d ed.), § 124, citing Merritt v. Old Colony R. Co., 11 Allen (Mass.) 80.

[10] Hutchinson Carriers (3d ed.), § 125; Illinois &c. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301. The true test as to where the carrier's liability attaches is not when a bill of lading is delivered, but when the goods are ready and nothing remains to be done by the shipper to place them in transitu. St.

formal acceptance is necessary.[11] The completion of the delivery, however, usually involves exclusive and actual possession by the carrier, and this possession involves a surrender of custody and control for the time being by the consignor.[12] Thus, where hogs which the owner desired to have transported were, when the train arrived on which he wished them to go, still in a private yard and had yet to be loaded, counted and receipted for, they were held not to be so far delivered to the railroad company as to make it liable for delay in shipping.[13] But, on the other hand, where cattle have been placed in the company's pen for immediate shipment and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman.[14] And delivery of a

Louis &c. R. Co. v. Blocker, 76 Okla. 279, 184 Pac. 584, 585 (citing text). And even though a shipper assumes the duty of loading the property, the carrier is liable for an injury which was likely to result from moving the car by reason of the manner of loading. Doan v. St. Louis &c. R. Co., 38 Mo. App. 408.

[11] Aiken v. Chicago &c. R. Co., 68 Iowa 363, 27 N. W. 281; Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344, and note. See also Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Galena &c. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Moses v. Boston &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222.

[12] Wilson v. Atlanta & C. R. Co., 82 Ga. 386, 9 S. E. 1076, 40 Am. & Eng. R. Cas. 25, citing Wells v. Wilmington &c. R. Co., 51 N. Car. 47, 72 Am. Dec. 556, and distinguishing Central R. v. Hines, 19 Ga. 203; Fleming v. Hammond, 19 Ga. 145. See also St. Louis I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 1139, 30 L. ed. 1077; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944; Lake Shore &c. R. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Chicago &c. R. Co. v. Powers, 73 Nebr. 816, 103 N. W. 678. In State v. Intoxicating Liquors, 83 Maine 158, 21 Atl. 840, it was held that a common carrier, having received goods for carriage, has a special title to them, which gives it a legal right to the custody thereof, before delivery to the consignee, as against one having no right.

[13] Frazier v. Railroad Co., 48 Iowa 571. As to sufficiency of evidence of delivery, see Savannah &c. R. Co. v. Steininger, 84 Ga. 579, 11 S. E. 236, 42 Am. & Eng. R. Cas. 424, note.

[1] Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568. See also London &c. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752; O'Neill v. New York Cent. R. Co., 60 N. Y. 141; Otis Co. v. Missouri Pac. R. Co., 112

horse at a pen and on a chute provided by the company and designated by its agent for use in loading a car is sufficient to establish liability as a common carrier for damages resulting from the rottenness of the chute.[15] Goods stored along the line awaiting shipment, where the owner is to load them when he can get the necessary cars, are not completely delivered to the railroad company until they are so loaded and ready for shipment.[16] And cotton, still in the possession of a compress company, for which the railroad company has as yet given no bill of lading, and of which it has neither the actual or constructive possession nor the custody or control, is not yet delivered to the railroad company for carriage, and the latter is not liable as a carrier to the owner for its loss, although it has not furnished cars for its transportation as rapidly as it had agreed with the compress company to do.[17] So, where a bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense, for convenience of carriage, and exempted it from loss by fire while at depots, stations, and warehouses, it was held that the company was not liable as a common carrier for loss of the cotton by fire, not caused by negligence, while stored in a warehouse for compression, though the warehouseman had received the cotton as agent of the railroad company.[18]

Mo. 622, 20 S. W. 676, 55 Am. & Eng. R. Cas. 637; Meloche v. Chicago &c. R. Co., 116 Mich. 69, 74 N. W. 301. But a mere permission by a railroad company's agent to an owner of cattle to place them in the company's yards, no bill of lading having been given, does not render the company liable for damages caused by the escape of the cattle. Fort Worth &c. R. Co. v. Riley (Tex. Civ. App.), 1 S. W. 446, 27 Am. & Eng. R. Cas. 49.

[15] McCullough v. Wabash, W. R. Co., 34 Mo. App. 23.

[16] Wilson v. Atlanta &c. R. Co., 82 Ga. 386, 9 S. E. 1076. See also Central &c. R. Co. v. Segina Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965n; Reed v. Philadelphia &c. R. Co., 3 Houst. (Del.) 176; Louisville &c. R. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739; Burrowes v. Chicago &c. R. Co., 85 Nebr. 497, 123 N. W. 1028, 34 L. R. A. (N. S.) 220; Spade v. Hudson River R. Co., 16 Barb. (N. Y.) 383; Ft. Worth &c. R. Co. v. Riley (Tex. Civ. App.), 1 S. W. 446.

[17] St. Louis &c. R. Co. v. Commercial &c. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154.

[18] Lancaster Mills v. Merchants'

Nor is the mere delivery of a warehouse receipt to the carrier with an order to deliver the goods to it such a constructive delivery of the goods as will render it liable where they are burned in the warehouse before it can remove them.[19]

§ 2117 (1405). Effect of requirement that shipper shall load.— The shipper is sometimes required by contract or by custom to load or to assist in loading the freight. This requirement may be of importance in determining whether there has been a com-

&c. Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586. See also St. Louis &c. R. Co. v. Commercial &c. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154; Tate v. Yazoo &c. R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. 649; Martin v. St. Louis &c. R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112. But see Otis Company v. Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676, 55 Am. & Eng. R. Cas. 636, in which it is held that where a railroad company by the bill of lading reserved to itself the privilege of compressing the cotton which it contracted to transport, such reservation being evidently for its own convenience, the placing of the cotton in the hands of the compress company to be compressed made that company the carrier's agent, for whose negligence the carrier was liable the same as its own negligence; so it was proper to refuse an instruction which asserted that it was incumbent on the plaintiff, in order to avoid the exception in the bill of lading as to loss by fire, to show that the fire was the result of the defendant's negligence, because this instruction excluded a liability for the negligence of the compress company. As to railroad company's liability for cotton to be compressed before transportation, see also St. Louis &c. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077. Cotton was placed on a platform, which, with the consent of the company, had been built adjacent to the company's side track by the municipal authorities, who retained control of it. It had not been received by the company, nor had there been any order to ship it. The company was held not liable as a common carrier. Brown v. Atlanta &c. R. Co., 19 S. Car. 39, 13 Am. & Eng. R. Cas. 479. But see St. Louis &c. R. Co. v. Martin (Tex. Civ. App.), 35 S. W. 28. In Deming v. Merchants' &c. Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518 and note, it was decided that, a compress company's receipt having been given, according to usage, by the owner to a carrier, and a bill of lading issued by the latter, the liability of the carrier to the owner began, though the cotton was not yet actually delivered to the carrier.

[19] Stewart v. Gracy, 93 Tenn., 314, 27 S. W. 664.

plete delivery, although it is not always controlling either upon that question or upon the general question of the liability of the carrier. It is evident that where goods remain in the possession and control of the owner under an agreement that he shall load them, when he can get the necessary cars, there is no complete delivery even though they may be upon the premises of the railroad company, and if the company duly furnishes the cars he must not unreasonably delay the train in loading and can not hold the company liable in damages, as for a refusal to receive and carry the goods, if it refuses to delay the train an unreasonable time.[20] But where goods are delivered to the company for immediate shipment and accepted by it and placed in its freight house, it is liable as a common carrier for their loss by fire while in the freight house awaiting shipment which had been delayed on account of the failure of the company to furnish necessary cars, notwithstanding the fact that it was the duty of the shipper to load them.[21] In other words, as stated in the case just cited, the agreement or duty of a shipper to load goods into the cars does not necessarily postpone "the time when the railroad company takes on the character of a common carrier." It is sufficient that there has been a complete delivery and acceptance for immediate shipment.[22]

§ 2118 (1406). **Delivery to authorized agent.**—The delivery is sufficient if made to an agent acting by the carrier's authority, or to one so placed by the carrier that the consignor has the

[20] Louisville &c. R. Co. v. Godman, 104 Ind. 490, 4 N. E. 163. See also Frazier v. Kansas City &c. R. Co., 48 Iowa 571; Wilson v. Atlanta &c. R. Co., 82 Ga. 386, 9 S. E. 1076; Burrowes v. Chicago &c. R. Co., 85 Nebr. 497, 123 N. W. 1028, 34 L. R. A. (N. S.) 220.

[21] London &c. Ins. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752, 61 Am. & Eng. R. Cas. 225. See also Hannibal R. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; Fitchburg &c. R. Co. v. Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427; Grant v. Norway, 10 C. B. 665, 70 E. C. L. 665.

[22] See also Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215; Greenwood &c. Co. v. Cooper, 10 La. Ann. 796.

right to assume that he has been authorized to receive freight.[23] It has been held that a shipper may assume, in the absence of anything to the contrary, that a railroad station agent has authority to contract with reference to the acceptance and carriage of

[23] Harrell v. Wilmington & W. R. Co., 106 N. Car. 258, 11 S. E. 286, 42 Am. & Eng. R. Cas. 417. This was an action to recover a penalty under North Carolina Code, § 1967, for failure to ship goods, the defendant denying their receipt. According to plaintiff's evidence, he carried the goods to defendant's depot. The station agent and one R. were in the office. Plaintiff stated his wish without addressing either of them. R. went out and weighed the goods, went back into the office where the station agent was, and gave a receipt signed, in the latter's name "per R." There was evidence that R. had been in the office several months, that he handled and delivered goods, and had on one occasion shipped them. Plaintiff also testified that when he went to the station to complain of the non-shipment of the goods, the station agent cursed and abused R., saying it was the third time he had done so that fall. Held, that the evidence was sufficient to sustain a finding that the goods had been delivered to the defendant. In Rogers v. Long Island &c. R. Co., 2 Lans (N. Y.) 269, the owner of the trunk sent it to the defendant's depot by an expressman, who placed it within the enclosure of the depot beside the baggage crate, which was locked, and then went to the ticket office and informed the ticket agent of the fact, who replied, "all right"; and it was held that the case should have gone to the jury upon the question of delivery, the court saying that it was enough to establish a delivery, in the first instance, to prove that a person, acting as the agent of the company, received and accepted the property for transportation, even if there should be, in fact, another person having charge of the business of handling freight. "The ticket agent," said the court, "was apparently in charge of the depot. The company which sanctioned his employment and thus holds him out to the world as its agent is not at liberty to repudiate his acts." See also Minter v. Pacific R. Co., 41 Mo. 503, 97 Am. Dec. 288, and note; Southern Ex. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Fisher v. Geddes, 15 La. Ann. 14; Lord v. Maine Cent. R. Co., 105 Maine 255, 74 Atl. 117; Dwight v. Brewster, 18 Mass. 50, 11 Am. Dec. 133; Wolf v. Grand Rapids &c. Ry. Co., 149 Mich. 75, 112 N. W. 732; Hoffman &c. Co. v. St. Louis &c. Ry. Co., 119 Mo. App. 495, 94 S. W. 597; Milne v. Chicago &c. R. Co., 155 Mo. App. 465, 135 S. W. 85; Thurman v. Wells, 18 Barb. (N. Y.) 500; Cronkite v. Wells, 32 N. Y. 247; Lloyd v. Barden, 3 Strob. (S. Car.) 343; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Quarrier v. Baltimore &c. R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 536; McCourt v. London &c. R. Co., 3 Ir.

freight.[24] But this assumption in the absence of anything further to justify it, can not safely extend to any contract beyond the usual authority of such agents, and a mere station agent will not, under ordinary circumstances, be presumed to have authority to bind the company by contract to carry freight beyond its own line.[25] Delivery to a drayman or other servant of the company who is accustomed to collect and receive goods for the company at the places of business of its patrons is a delivery to the company,[26] and the company may become respon-

Rep. C. L. 107; D'Anjou v. Deagle, 3 Harris & J. 206; Wilson v. York &c. R. Co., 18 Eng. L. & Eq. 557; Riley v. Horne, 1 C. & P. 610; Long v. Horne, 1 C. & P. 610; Winkfield v. Packington, 2 C. & P. 599; Boys v. Pink, 8 Car. & P. 361; Cobban v. Downe, 5 Esp. 41; Giles v. Taff Vale R. Co., 2 E. & B. 822, 23 L. J. Q. B. 43; Street v. Morrison, 10 New Bruns. 296. Delivery to an unauthorized person is no delivery unless notice is given. Trowbridge v. Chapin, 23 Conn. 595; Ford v. Mitchell, 21 Ind. 54; Leigh v. Smith, 1 C. & P. 638; Young v. Canadian Pac. R. Co., 1 Manitoba 205.

[24] Lake Erie &c. R. Co. v. Rosenberg, 31 Ill. App. 47; Wood v. Chicago &c. R. Co., 68 Iowa 491, 24 N. W. 473, 56 Am. Rep. 861, 24 Am. & Eng. R. Cas. 91; Pruitt v. Hannibal etc. R. Co., 62 Mo. 527; Miller v. Chicago &c. R. Co., 1 Mo. App. 474; Deming v. Grand Trunk etc. R. Co., 48 N. H. 455; Gulf &c. R. Co. v. Short (Tex. Civ. App.), 51 S. W. 261. See also Lord v. Maine Cent. R. Co., 105 Maine 255, 74 Atl. 117; Watson v. Memphis &c. R. Co., 9 Heisk (56 Tenn.) 255; McNeer v. Chesapeake &c. R. Co., 76 W. Va. 803, 86 S. E. 887 (citing § 345 ante).

[25] Minter v. Southern Kansas R. Co., 56 Mo. App. 282; Gulf &c. R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Burroughs v. Norwich &c. R. Co., 100 Mass. 26, 1 Am. Rep. 78. See also Cronkite v. Wells, 32 N. Y. 247; Missouri Coal Co. v. Hannibal &c. R. Co., 35 Mo. 84. Agent at one station may have authority to contract for shipment from another place, but plaintiff must prove it. McManus v. Chicago &c. R. Co., 138 Iowa 150, 115 N. W. 919, 128 Am. St. 180.

[26] Wilmington &c. Co. v. Adams Express Co., 8 Houst. (Del.) 329, 32 Atl. 250; Davey v. Mason, 1 Car. & M. 45; Baxendale v. Hart, 21 L. J. Exch. 123, 6 Exch. 769; Quarrier v. Baltimore &c. R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535. See also Pickford v. Grand Junction R. Co., 12 M. & W. 766; Waldron v. Chicago &c. R. Co., 1 Dak. 351, 46 N. W. 456; Lord v. Maine Cent. R. Co., 105 Maine 255, 74 Atl. 117; Whitbeck v. Schuyler, 44 Barb. (N. Y.) 469; Roy v. Chesapeake &c. R. Co., 61 W. Va. 616, 57 S. E. 39, 40 (quoting text), 31 L. R. A. (N. S.) 1n; Duff v. Budd, 3 Brod. & B. 177; Boys v. Pink, 8 Car. & P. 361.

sible for freight or baggage delivered to one who is in the habit of receiving such articles for it at a station where it has no other agent of its own, although such person is the regular agent of a connecting line at such point.[27]

§ 2119 (1407). **Delivery to unauthorized person.**—Delivery to an unauthorized person, even if he be an agent or servant of the company, is not a good delivery to the company unless, because of his position or other circumstances for which the company is responsible, the shipper is justified in assuming that such person has authority to receive the freight for the company. Thus, it has been held that delivery to a deck hand on a steamboat is not a good delivery to the carrier.[28] So, of course, if the shipper has notice that the agent has no such authority this will prevent an assumption to the contrary on the part of the shipper.[29] But if the goods are received and transportation is actually undertaken by the carrier, the fact that the agent had no authority to receive them, even though known to the shipper, will not necessarily relieve the carrier from liability for their loss.[30]

§ 2120 (1408). **Delivery by agent of shipper.**—As delivery may be made to the authorized agent of the company, so it may

[27] Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44; McCourt v. London &c. R. Co., 3 Ir. R. C. L. 107, 402. See also Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

[28] Trowbridge v. Chapin, 23 Conn. 595; Ford v. Mitchell, 21 Ind. 54. See also for cases in which it was held that there was not a good delivery to the carrier. Cronkite v. Wells, 32 N. Y. 247; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Porter v. Chicago &c. R. Co., 41 Iowa 358; Elkins v. Boston &c. R. Co., 23 N. H. 275; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; Young v. Canadian Pac. R. Co., 1 Manitoba L. R. 205; Butler v. Basing, 2 C. & P. 613, 12 E. C. L. 287.

[29] See Walker v. York &c. R., 23 L. J. Q. B. 73, 2 E. & B. 750; Slim v. Great Northern &c. R. Co., 23 L. J. C. P. 166.

[30] See Bennett v. American Exp. Co., 83 Maine 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. 774; Fillebrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606. See also as to good delivery to cotton compress company acting as agent for carrier. Arthur v. Texas & P. R. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. ed. 590.

be made by an authorized agent of the shipper. The rules which apply are, in the main, the same in both cases. Where the owner of goods places them with an agent, who is to secure their transportation by a carrier, the agent is presumptively authorized to exercise all the powers necessary to effect the purpose of the agency, and in the absence of any limitation upon his authority which is or ought to be known to the carrier, the acts of the agent in directing and agreeing upon the time, manner, terms and conditions of shipment will bind his principal.[31] It has also been held that when the delivery is disputed, and the proof doubtful, evidence is admissible to show that the shipper's agent who claimed to have delivered the articles had been convicted of larceny of goods from his principal.[32] But a telephone message from a railroad company to the owner of a tug boat, who is a common carrier, to send his boat to a certain place and transport hay from that place to another simply authorizes him to transport such hay as a common carrier and does not authorize him to bind the company by employing another tug owner to do the work.[33]

§ 2121 (1409). **Delivery must be for immediate shipment.**— Railroad companies are held to the liability of warehousemen, not to that of common carriers, for goods deposited with them otherwise than for immediate shipment. Thus, if the shipment is not to begin till further orders from the consignor, or something has been done by him, the carrier's liability attaches the instant, but not before, the orders have been given, or the something has been done.[34] If, however, the delay in shipment is due,

[31] Nelson v. Hudson River R. Co., 48 N. Y. 498; York Co. v. Illinois Cent. R. Co., 3 Wall. (U. S.) 113; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; London &c. R. Co. v. Bartlett, 7 Hurlst. & N. 400; Benson v. Oregon &c. Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052, 19 Ann. Cas. 803. See also to effect that initial carrier may be owner's agent to deliver to connecting carrier. Harrington v. Wabash R. Co., 108 Minn. 257, 122 N. W. 14, 23 L. R. A. (N. S.) 745. Compare Hayes v. Campbell, 63 Cal. 143.

[32] Wilmington &c. Co. v. Adams Exp. Co., 8 Houst. (Del.) 329, 32 Atl. 250.

[33] Bleecker v. Satsop R. Co., 3 Wash. 77, 27 Pac. 1073.

[34] St. Louis &c. R. Co. v. Knight.

not to the request or default of the consignor, but to the exigencies of the railroad company's business or to its default, the carrier's liability usually dates from the deposit and not from the commencement of the journey. Thus, where goods bearing the consignee's name and address are delivered to a railroad company, without agreement to the contrary, the delivery is equivalent to an express order to ship immediately;[35] and the fact that the consignee consents that they may wait in the freight

122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077; Mt. Vernon Co. v. Alabama &c. R. Co., 92 Ala. 296, 8 So. 687; St. Louis &c. R. Co. v. Montgomery, 39 Ill. 335; Judson v. Western R. Co., 4 Allen (Mass.) 520, 81 Am. Dec. 718; Fitchburg &c. R. Co. v. Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427; Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Watts v. Boston & L. R. Co., 106 Mass. 466; Nichols v. Smith, 115 Mass. 332; Michigan S. R. v. Shurtz, 7 Mich. 515; Lawrence v. Winona &c. R. Co., 15 Minn. 390, 2 Am. Rep. 130 and note; Moses v. Boston &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Wade v. Wheeler, 3 Lans. (N. Y.) 201; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; McDonald v. Western R. Co., 34 N. Y. 497; Rogers v. Wheeler, 52 N. Y. 262; O'Neill v. New York &c. R. Co., 60 N. Y. 138; Pittsburg &c. R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256. See also Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739; St. Louis &c. R. Co. v. Burrow Co., 89 Ark. 178, 116 S. W. 198; American Lead Pencil Co. v. Nashville &c. R. Co., 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323; Schmidt v. Chicago &c. R. Co., 90 Wis. 504, 63 N. W. 1057. But see Michaels v. New York R. Co., 30 N. Y. 564, 86 Am. Dec. 415. The fact that the railroad company permitted a car of lumber, while waiting further orders from the shipper, to stand near a dry kiln in which a fire originated which destroyed the lumber, was not such negligence as would render it liable as warehouseman, since it was merely a gratuitous bailee, and the destruction of the car was not the natural and proximate consequence of the act complained of. Basnight v. Atlantic &c. R. Co., 111 N. Car. 592, 16 S. E. 323. In St. Louis &c. R. Co. v. Montgomery, 39 Ill. 335, it was held that the company's liability was that of warehouseman only for goods already loaded which were damaged while being held at the company's request. Where a carrier, after informing the owner of goods delivered to it for transportation that they will be held at place of receipt till the freight charges are prepaid, ships the goods without payment, and without notice to the owner, it is liable for damages resulting from such premature shipment. Champion v. Canadian R. Co., 43 Fed. 775, 11 L. R. A. 128.

[35] O'Bannon v. Southern Ex. Co., 51 Ala. 481; Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Trowbridge v. Chapin, 23 Conn. 595; Grand Tower &c. Co.

house because the company has no car ready, will not relieve it from liability as an insurer.[36]

§ 2122 (1410). Notice of delivery.—There must always be either actual or constructive notice of the deposit of goods for transportation. If the deposit is made in the usual manner at a place where goods have been constantly received for transportation, the railroad company may, it seems, be charged with constructive notice even though the delivery was not made to any of its servants.[37] But this is a doctrine to be carefully applied, and it has been held that leaving goods on a dock near a boat, in accordance with the usual custom, is not sufficient unless notice is given.[38] The general rule is that the carrier must have notice.[39]

v. Ullman, 89 Ill. 244; Ford v. Mitchell, 21 Ind. 54; Williams v. Peytavin, 4 Mart. (La.) 304; London &c. Co. v. Rome &c. R. Co., 68 Hun 598, 23 N. Y. S. 231; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Grosvenor v. New York C. R. Co., 39 N. Y. 34; Pittsburgh &c. R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Clarke v. Needles, 25 Pa. St. 338; Gleason v. Goodrich Trans. Co., 32 Wis. 85, 14 Am. Dec. 716; Randleson v. Murray, 8 A. & E. 109; Burrell v. North, 2 Car. & Kir. 680; Dale v. Hall, 1 Wils. 281. But see Illinois &c. R. Co. v. Ashmead, 58 Ill. 487; Illinois &c. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois &c. R. Co. v. Hornberger, 77 Ill. 457, in which cases the company was held liable as warehouseman only for goods deposited on a platform with the understanding that they would be shipped as soon as cars and the permission of the military authorities could be had.

[36] Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Shelton v. Merchants' D. T. Co., 36 N. Y. S. C. 527, 59 N. Y. 258; Gregory v. Wabash Ry. Co., 46 Mo. App. 574.

[37] Merriam v. Hartford etc. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Converse v. Norwich &c. Trans. Co., 33 Conn. 166; Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296. See Green v. Milwaukee &c. R. Co., 38 Iowa 100, 41 Iowa 410, where the company was held liable for a trunk left by a drayman in the waiting-room, without notice, in accordance with an established custom. See also Wright v. Caldwell, 3 Mich. 51; Packard v. Getman, 6 Cowen (N. Y.) 757, 16 Am. Dec. 475; O'Bannon v. Southern Ex. Co., 51 Ala. 481; Bukman v. Levi, 3 Camp. 414.

[38] Packard v. Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475 and note. See also Lennon v. Illinois Cent. R. Co., 127 Iowa 431, 103 N. W. 343; Brown v. Oregon &c. R. Co., 63 Ore. 396, 128 Pac. 38; Brown v. Atlantic &c. R. Co., 19 S. Car. 39; Ft. Worth &c. R. Co. v. Riley (Tex. Civ. App.), 1 S. W. 446.

[39] Leigh v. Smith, 1 Car. & P. 638; Kerr v. Grand Trunk R. Co.,

§ 2123 (1411). **Place of delivery.**—Goods are usually delivered to railroad companies at established stations, and they may refuse to receive them at unusual places.[40] But the delivery may be sufficient although, made at an unusual place to an authorized agent,[41] and accepted by him, or, under some circumstances,

24 U. C. C. P. 209; Grosvenor v. New York &c. R. Co., 39 N. Y. 34; Basnight v. Atlantic &c. R. Co., 111 N. Car. 592, 16 S. E. 323. See also Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Little Rock &c. R. Co. v. Hunter, 42 Ark. 200; Hickox v. Naugatuck &c. R. Co., 31 Conn. 281, 83 Am. Dec. 143; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Salinger v. Simmons, 57 Barb. (N. Y.) 513; Pittsburg &c. R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Selway v. Holloway, 1 Ld. Rayd. 46; Lovett v. Hobbs, 2 Show. 127; Leigh v. Smith, 1 C. & P. 638.

[40] Kellogg v. Suffolk &c. R. Co., 100 N. Car. 158, 5 S. E. 379, 35 Am. & Eng. R. Cas. 529; Chicago &c. A. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133 and note; State v. New Haven &c. Co., 41 Conn. 134; Bedford &c. Stone Co. v. Oman, 134 Fed. 441. While a carrier is not liable for failing to furnish cars or to transport goods, unless offered at a usual or designated place for receiving freight, yet where goods are placed at a station upon the line of a railroad to be transported, the refusal of the carrier, upon demand, to furnish cars for the transportation of the property relieves the owner from making any further delivery or offer to deliver. Louisville &c. R. Co. v. Godman, 104 Ind. 490, 4 N. E. 163; Louisville &c. R. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674, 32 Am. & Eng. R. Cas. 532. In Wells v. Wilmington &c. R. Co., 51 N. Car. 47, 72 Am. Dec. 556, it was held that the defendant was not liable for goods lost in consequence of the train's failure to stop for them at the roadside where they had been placed in reliance on the conductor's promise that he would stop there for them. The facts that a mail train stopped regularly at a certain place to deliver mail and that the place was set down in circulars and orders of the company as a station, do not necessarily make such place a regular station for the reception of freight. Land v. Wilmington &c. R. Co., 104 N. Car. 48, 10 S. E. 80, 40 Am. & Eng. R. Cas. 18. Neither is a point on a railroad where there was never any station agent, no agent's office, nor books kept, tickets sold, or bills of lading given, but where conductors had frequently stopped trains to receive and let off freight and passengers, a regular station within the meaning of the same law. Kellogg v. Suffolk &c. R. Co., 100 N. Car. 158, 5 S. E. 379, 35 Am. & Eng. R. Cas. 529.

[41] Cronkite v. Wells, 32 N. Y. 247; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Missouri &c. R. Co. v. Hanni-

even if made at a place not an established station but where the company has habitually received freight. Thus, where a railroad company had erected a platform on which, in the usual course of business, cotton was stored for shipment by the next train, it was held that the shipper could recover as from a carrier for cotton stored on such platform and destroyed by fire set by one of the company's locomotives.[42] A like decision was rendered where goods were placed on a depot platform for shipment, in accordance with the usual custom, with the knowledge of the carrier's agent, and were set on fire by a boy who was playing on the platform and could have been seen by the agent from his office in the depot.[43] And where it was the custom to deposit cotton in the street beside the railroad company's platform or in the company's cotton yard, a delivery there was held sufficient.[44] But loading goods on a car standing on a side track is not sufficient delivery to the company, where there is no custom to that effect and the company's agent, upon being notified, refuses to receive and ship them.[45]

bal &c. R. Co., 35 Mo. 84; Georgia &c. Ry. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961. But compare Wells v. Wilmington &c. R. Co., 51 N. Car. 47, 72 Am. Dec. 566.

[42] Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. 408. But a place on a line of railroad where there is a switch, but neither agent, station, nor platform, and where shipments are made only by loading on the cars, and where freight is delivered when parties are ready to receive the same, is not a depot, and a deposit of cotton near such switch does not constitute such a delivery to the company as to render it thereafter liable as a common carrier. Kansas City &c. R. Co. v. Lilly (Miss.), 8 So. 644, 45 Am. & Eng. R. Cas. 379. See Missouri P. R. Co. v. Douglass, 2 Tex. App. (Civ. Cas.) 32, 16 Am. & Eng. R. Cas. 98.

[43] Ft. Worth &c. R. Co. v. Martin, 12 Tex. Civ. App. 464, 35 S. W. 21. See also Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

[44] Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54. See also Pittsburgh &c. R. Co. v. American Tobacco Co., 126 Ky. 582, 104 S. W. 377; Washburn Crosby Co. v. Boston &c. R. Co., 180 Mass. 252, 62 N. E. 590; Wright v. Caldwell, 3 Mich. 51.

[45] Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312. See also Southern R. Co. v. Bivings, 3 Ga. App. 552, 60 S. E. 287; Kansas City &c. R. Co. v. Lilly (Miss.), 8 So. 644.

§ 2124 (1412). **Delivery to connecting carrier.**—The liability of a connecting carrier does not attach, and the duty of the first carrier is not fully performed, until there has been an actual delivery to the connecting carrier, or notice under such circumstances, as according to usage, contract, or the course of business, will constitute a constructive delivery.[46] Thus, it is not a good delivery to the connecting carrier, in the absence of some special agreement or custom, to merely store the goods in a warehouse at the end of the route.[47] And where a freight car is to be transported over connecting lines, the liability of the connecting carrier does not begin until the car is transferred to it.[48] So, it has been held that merely placing a car on the side track of the connecting carrier, without giving the latter any notice or directions, and without marking it with the name and address of the consignee, is not a sufficient delivery to establish a contract relation between the carriers and make the latter liable as a common carrier to the former.[49] It may be said, in general, that the

[46] Post, § 2181. See also Texas &c. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358. But it is held that an action for failure to deliver to a connecting line will not lie where the two lines are not connected for that purpose and there is no agent at the junction of the two roads. St. Louis &c. R. Co. v. Marrs, 60 Ark. 637, 31 S. W. 42. See also Shelbyville R. Co. v. Louisville &c. R. Co., 82 Ky. 541; Central Stock Yds. Co. v. Louisville & N. R. Co., 118 Fed. 113, 63 L. R. A. 213, affirmed in 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565.

[47] Irish v. Milwaukee &c. Co., 19 Minn. 376, 18 Am. Rep. 340; Texas &c. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. ed. 362; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358; Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; note to Wells v. Thomas, 72 Am. Dec. 228, 237, 238. See also Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 360; Bennett v. Missouri Pac. Ry. Co., 46 Mo. App. 656; post, § 2181. But compare Peoria &c. R. Co. v. United States &c. Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. 348; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Buston v. Pennsylvania R. Co., 119 Fed. 808.

[48] Rome R. Co. v. Sloan, 39 Ga. 636. See also Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742. And compare Hewett v. Chicago R. Co., 63 Iowa 611, 19 N. W. 790, 18 Am. & Eng. R. Cas. 568; Newport News &c. R. Co. v. Mendell, 17 Ky. L. 1400, 34 S. W. 1081.

[49] Mt. Vernon Co. v. Alabama &c. Co., 92 Ala. 296, 8 So. 687; Seaboard &c. Ry. v. Friedman, 128 Ga. 316, 57 S. E. 778; Kentucky

rules in regard to the delivery by one carrier to another are substantially the same as those which govern the delivery by a shipper to a carrier.[50] But a mere constructive delivery, which is good as between the two carriers, according to their usage, or a special contract between them, may not be sufficient to bind the shipper and deprive him of recourse upon the initial carrier.[51] Evidence of a well-established, general and uniform custom is generally admissible, even as against the shipper, where there are no special directions, or the like.[52] And the usage or usual course of dealing between connecting carriers in regard to the delivery and receipt of freight may be shown, in such a case, as between themselves.[53]

§ 2125 (1413). Evidence of delivery.[54]—It has been held that whether freight has been delivered to a common carrier, so as to fix his liability as such, is a mixed question of law and fact, and that delivery may be shown by proving that the freight was sent to the place where the carrier was accustomed to receive such freight, and that notice was duly given that it was there for transportation.[55] The burden of proving the delivery is upon

&c. Insurance Co. v. Nashville &c. R. Co., 8 Baxt. (Tenn.) 268. But see Truax v. Philadelphia &c. R. Co., 3 Houst. (Del.) 233; McMillan v. Chicago &c. R. Co., 147 Iowa 596, 124 N. W. 1069.

[50] Shelbyville R. Co. v. Louisville &c. R. Co., 82 Ky. 541.

[51] Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Reynolds v. Boston &c. R. Co., 121 Mass. 291; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; McDonald v. Western &c. R. Co., 34 N. Y. 497; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Conkey v. Milwaukee &c. R. Co., 31 Wis. 619, 11 Am. Rep. 630.

[52] Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Converse v. Norwich &c. Co., 33 Conn. 166; Pratt v. Railway Co., 95 U. S. 43, 24 L. ed. 336. See also Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762.

[53] Root v. Great Western R. Co., 65 Barb. (N. Y.) 619; Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Gulf &c. R. Co. v. Insurance Co. (Tex.), 28 S. W. 237. See also Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388.

[54] This section is cited in Blackwell v. Oregon &c. Ry. Co., 82 Ore. 303, 161 Pac. 565.

[55] Bowie v. Baltimore &c. R. Co., 1 McArthur (D. C.) 609. See Nichols v. Smith, 115 Mass. 332. Held a question of fact for the jury in

the plaintiff.[56] The fact that a bill of lading has been issued by the carrier is prima facie but not conclusive evidence of delivery.[57] Thus, in a recent case[58] it appeared that a compress company was in the habit of receiving cotton at its sheds, and that a railroad company had not only contracted with it to transport all cotton brought by the owners to the sheds of the compress company, but was also in the habit of issuing bills of lading to the owners, upon their request, in exchange for the receipts of the express company, but this was for the mere convenience of all parties and without any intention of making any change in the actual or legal custody of the cotton while in the sheds. The court held that the railroad company was not liable for the loss of the cotton by fire while in the sheds, although it had accumulated therein by reason of the delay of such company in furnishing transportation.[59] So, it is held that the fact of the delivery of freight to a common carrier for carriage may be proved by parol evidence, notwithstanding the existence of a receipt or bill of lading given by the carrier for such freight, as such receipt or bill of lading does not fall within the best-evidence rule as proof of such fact of delivery.[60] We have already

Houston &c. R. Co. v. Hodde, 42 Tex. 467. But held a question of law where there was no dispute as to the facts in Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742. See also New York Cent. &c. R. Co. v. General Elec. Co., 219 N. Y. 227, 114 N. E. 115, 117 (delivery on general storage track sufficient).

[56] Louisville &c. R. Co. v. Echols, 97 Ala. 556, 12 So. 304; Canfield v. Baltimore &c. R. Co., 14 J. & S. (N. Y.) 238.

[57] Post, § 2139. See also Martin v. St. Louis &c. R. Co., 55 Ark. 510, 19 S. W. 314; Cunard &c. Co. v. Kelley, 115 Fed. 678; Union Pac. R. Co. v. Hefner, 3 Colo. App. 313, 33 Pac. 72; Pittsburgh &c. R. Co. v. American Tobacco Co., 126 Ky. 582, 104 S. W. 377; Fasy v. International Nav. Co., 177 N. Y. 591, 70 N. E. 1098; Burwell v. Raleigh &c. R. Co., 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410.

[58] St. Louis I. M. & S. R. Co. v. Commercial &c. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154.

[59] To the same effect is St. Louis I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077. See also California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. ed. 730.

[60] Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116. See also Gwyn &c. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675.

considered what is sufficient evidence to constitute a complete delivery and the competency and effect of evidence of custom upon the question, and a further consideration of the subject seems unnecessary in this connection.

§ 2126 (1413a). Estoppel by acceptance to raise question of ownership.—It has been held that a carrier will be bound by its recognition of ownership of the goods in the consignor at the time they were accepted for shipment. Thus, where goods were shipped by a married woman and a receipt therefor given her, in a suit by her to recover for their loss it was urged that she, not being the owner, could not sue in her own name, but should have sued in her husband's name. But the court was not impressed with the point and held that as she was the bailor and consignor, she had a right to maintain the action and that the defendant, having recognized her as the owner in receiving the goods, was estopped from disputing her ownership when sued for the loss. This question could only have been raised by the husband or a creditor.[61]

§ 2127 (1414). Delivery to carrier passes title to consignee.—We shall elsewhere consider the right of stoppage in transitu and the relative rights of the consignor and consignee in that connection, but it may be well at this place to state generally the effect of delivery to the carrier upon the title to the goods delivered. The effect of such delivery, of course, depends very largely upon the intention of the parties, which is usually determined by the contract in each particular case, but, as a general rule, in the absence of any agreement to the contrary, delivery to the carrier is delivery to the consignee.[62] So, where the seller

[61] Chicago &c. R. Co. v. Shea, 66 Ill. 471. See also Great Western R. Co. v. McComas, 33 Ill. 186.

[62] Pilgreen v. State, 71 Ala. 368; State v. Carl, 43 Ark. 353, 51 Am. Rep. 565; Heert v. Ridenour &c. Grocer Co., 48 Colo. 42, 108 Pac. 968, 139 Am. St. 259 (even though seller paid the freight); Mann v. Glauber, 96 Ga. 795, 22 S. E. 405; Pennsylvania Co. v. Holderman, 69 Ind. 18; Richtin v. McGary, 117 Ind. 132, 19 N. E. 731; Leggett &c. Co. v. Collier, 89 Iowa 144, 56 N. W. 417; Magruder v. Gage, 33 Md. 344, 3 Am. Rep. 177; Johnson v. Stoddard, 100 Mass. 306; Kessler v. Smith, 42 Minn. 494, 44 N. W.

agrees to deliver goods "f. o. b." at a certain place, after their arrival at that place it has been held that the carrier ceases to be the agent of the consignor and becomes the agent of the consignee, and the former can not maintain an action against the carrier for injuries to them after their arrival and before they are unloaded.[63] It has also been held that the reservation of the right to test the goods does not prevent the title from passing upon their delivery to the carrier where, in accordance with a long course of dealing between the parties, the goods are credited to the seller before delivery to the buyer and as soon as bills are received therefore, with the understanding that the purchaser should be given credit for such as he might return as unsatisfactory after testing them.[64] But where the seller undertakes to deliver the goods himself at the buyer's place of business and selects his own carrier the carrier is usually regarded as the agent of the seller, who thus assumes the risks of carriage,[65] and so where the sale is conditional upon payment on or before delivery, or the like, the mere delivery to the carrier before the condition

794; Meyer &c. Drug Co. v. McMahan, 50 Mo. App. 18; Kelsea v. Ramsey &c. Mfg. Co., 55 N. J. L. 320, 26 Atl. 907, 22 L. R. A. 415, and note reviewing many authorities; Garbracht v. Commonwealth, 96 Pa. St. 449, 42 Am. Rep. 550; Whitman &c. Co. v. Strand, 8 Wash. 647, 36 Pac. 682; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624; Benjamin on Sales, (7th Am. ed.) § 693. See also Cox v. Anderson, 194 Mass. 136, 80 N. E. 236; State v. Rosenberger, 212 Mo. 648, 111 S. W. 509, 20 L. R. A. (N. S.) 284, 126 Am. St. 580, and notes; also note in Ann. Cas. 1916A, 1048. But see where goods were consigned to shipper with directions to notify another. Pittsburgh &c. R. Co. v. Knox, 177 Ind. 344, 98 N. E. 295. And compare Bennett v. Dickinson, 106 Kans. 95, 186 Pac. 1005, 190 Pac. 757.

[63] Capehart v. Furman &c. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. 60. See note in 62 L. R. A. 795.

[64] Robbins v. Brazil Syndicate R. &c. Co., 63 Ind. App. 455, 114 N. E. 707, 709 (citing text); Wind v. Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219. To same effect, see Foley v. Felrath, 98 Ala. 176, 13 So. 485, 39 Am. St. 39; Bootby v. Plaisted, 51 N. H. 436, 12 Am. Rep. 140.

[65] Falvey v. Richmond, 87 Ga. 99, 13 S. E. 261; Devine v. Edwards, 101 Ill. 138; Murray v. Nichols &c. Co., 34 N. Y. St. 62, 11 N. Y. S. 734; Braddock Glass Co. v. Irwin, 153 Pa. St. 440, 25 Atl. 490; McLaughlin v. Marston, 78 Wis. 670, 47 N. W. 1058; Dunlop v. Lambert, 6 C. & F. 600; Coombs

precedent is performed will not ordinarily pass the title to the purchaser.[66]

§ 2128 (1414a). Acceptance of goods whose transportation would violate law.—It seems very clear that a carrier may refuse to accept for transportation, articles which it is forbidden to carry under legal penalties, as, for example, intoxicating liquors in prohibition states.[67] It has been held in this connection that the railroad company has a large discretion in passing upon the question whether the article offered is or is not "intoxicating liquor" within the meaning of the law.[68] But it also has been held in a prosecution of a carrier under a state liquor law, and we think properly, that a carrier in the absence of suspicious appearances of circumstances, is neither presumed to know nor authorized to find out, as a condition of receiving it, whether the package offered contains articles it is forbidden to carry.[69] So,

v. Bristol &c. R. Co., 3 H. & N. 1. See also Sohn v. Jervis, 101 Ind. 578; Garvan v. New York Cent. &c. R. Co., 210 Mass. 275, 96 N. E. 717 ("F. O. B." shipment).

[66] Merchants' Exch. Bank v. McGraw, 59 Fed. 972; Russell v. Minor, 22 Wend. (N. Y.) 659; Hammett v. Linneman, 48 N. Y. 399; Sneathen v. Grubbs, 88 Pa. St. 147; Bonner v. Marsh, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754. The text is cited in Southern &c. Ry. Co. v. Norman, 165 Ind. 126, 74 N. E. 897, 898. See also Gibson v. Inman Packet Co., 111 Ark. 521, 164 S. W. 280, Ann. Cas. 1916A, 1043n; Suit v. Woodhall, 113 Mass. 391; Daugherty v. Fowler, 44 Kans. 628, 25 Pac. 40, 10 L. R. A. 314. But compare Farmers' &c. Co. v. Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. 443; Norfolk Southern R. Co. v. Barnes, 104 N. Car. 25, 10 S. E. 83, 5 L. R. A. 611; Rechtin v. McGary, 117 Ind. 132, 19 N. E. 731. There is some difference of opinion as to the rule where goods are shipped "C. O. D." American Exp. Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. ed. 417; State v. Mullin, 78 Ohio St. 358, 85 N. E. 556, 18 L. R. A. (N. S.) 609, 125 Am. St. 710n; also notes in 22 L. R. A. (N. S.) 426, and 24 L. R. A. (N. S.) 143; and 5 Elliott Cont. § 5021. See for this rule and its limitations in the case of innocent third persons, 5 Elliott Cont. § 5022.

[67] Milwaukee Malt Extract Co. v. Chicago &c. R. Co., 73 Iowa 98, 34 N. W. 761; Glenn v. Southern Exp. Co., 170 N. Car. 286, 87 S. E. 136, L. R. A. 1918B, 438, (and note on p. 455 as to Webb-Kenyon and Wilson Acts). But see Southern Exp. Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185.

[68] Milwaukee Malt Extract Co. v. Chicago &c. R. Co., 73 Iowa 98, 34 N. W. 761.

[69] State v. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706.

a carrier may refuse to accept and carry goods of a dangerous character, such as nitro-glycerine, which it does not ordinarily carry,[70] and, as hereafter shown in another chapter, there are also circumstances or conditions in other cases which may justify such refusal.[71]

[70] The Nitroglycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206; California Powder Works v. Atlantic &c. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648n; 4 Elliott Cont. § 3149.

[71] See Springfield Light &c. Co. v. Norfolk &c. Ry. Co., 260 Fed. 254; Edwards v. Sherratt, 1 East 604; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83 (mobs and road under military control); Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983 (flood); Murphy Hardware Co. v. Southern R. Co., 150 N. Car. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200 and note (strike); notes in 20 L. R. A. (N. S.) 867; 10 L. R. A. (N. S.) 432; and 10 Am. & Eng. Ann. Cas. 272.

CHAPTER LXVI

BILLS OF LADING

Sec.

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§ 2135 (1415). Definition—Two-fold character.—A bill of lading is "a written acknowledgment by the common carrier of the receipt of certain goods and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person therein named or his order,"[1] and any instrument passing from the carrier to the shipper bearing these characteristics is effective as a bill of lading, no matter what its name or form.[2] The bill of lading is not necessary to establish the liabil-

[1] Bouv. Law Dict. 246. For other definitions of bills of lading, see 2 Am. & Eng. Encyc. of L. 223; The Delaware, 14 Wall. (U. S.) 579, 20 L .ed. 779; Union R. Co. v. Yeager. 34 Ind. 1; Merchants' Bank v. Hewitt, 3 Iowa 93; Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455; First Nat. Bank v. McAndrews, 5 Mont. 325, 5 Pac. 879, 51 Am. Rep. 51; Covill v. Hill, 4 Denio (N. Y.) 323; Cope v. Cordova, 1 Rawle (Pa.) 203; Empire T. Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 179.

[2] There have been attempts to

ity of the common carrier, for his liability usually begins with the completion of the delivery of the goods, whether a bill of lading has or has not been issued;[3] but this common-law liability

discriminate between bills of lading given by carriers by water and what are sometimes called "shipping receipts," given by carriers by land, but it is established that their effect is the same. In Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455, the court said: "These instruments consist each of a receipt for the goods, and an agreement to transport them to a certain place, and in our opinion are bills of lading." Hutchinson also says, on the same subject: "They are, however, the same in effect, and are intended merely to evidence the true intent of the transaction between the parties. In both cases they contain a description of the goods, an acknowledgment that they have been received by the carrier, the names of the shipper and consignee, the place of consignment, that they are in good condition, the terms of the carriage and such qualifications of the liability of the carrier as he and the shipper may have agreed upon, and the contract to carry to destination and there deliver to the consignee. They must be signed by the carrier or his authorized agent to bind him, and must be accepted by the shipper. And any contract with the carrier having these characteristics is entitled to the effect of a bill of lading, no matter how informally it may be drawn." Hutchinson Carriers (3d ed.), § 154. See also Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Union R. Co. v. Yeager, 34 Ind. 1; Montague v. The Henry B. Hyde, 82 Fed. 682. But compare Patrick v. Missouri &c. Ry. Co. (Ind. Ter.), 88 S. W. 330 (modified in Missouri &c. Ry. Co. v. Patrick, 144 Fed. 632); Pittsburgh &c. Ry. Co. v. Bryant, 36 Ind. App. 340, 75 N. E. 829; Cleveland &c. R. Co. v. C. A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685.

[3] Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Alabama &c. R. Co. v. Darby, 119 Ala. 531, 24 So. 713; Southern R. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333; Meloche v. Chicago &c. R. Co., 116 Mich. 69, 74 N. W. 301; Tate v. Yazoo &c. R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. 649; St. Louis &c. R. Co. v. Blocker, 76 Okla. 279, 184 Pac. 584, 585 (citing text). A parol contract is as effective as a bill of lading. Texas Pac. R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; Missouri &c. Ry. Co. v. Patrick, 144 Fed. 632; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527. "We know no rule of the common law, and no provision of statute, which requires a railroad company to give bills of lading. . . . Nor is there any rule of law requiring a consignor to take out a bill of lading and send it to the consignee." Johnson v. Stoddard, 100 Mass. 306. In some states, however, the carrier is compelled by statute to issue bills of lading when requested to do so. See Texas &c.

is generally qualified and limited by the bill of lading, which serves the double purpose of receipt and contract, although the limitations in the bill of lading can not relieve the railroad company of the character of a common carrier.[4] In its two-fold character of receipt and contract the bill of lading is subject to different rules of construction. In so far as it is merely a receipt, either party may explain or contradict it by parol, but as a contract it must be construed according to its terms.[5] If, however,

R. Co. v. Kuteman, 79 Tex. 465, 14 S. W. 1069, where it was held that under the Texas statute, imposing a penalty on common carriers for refusing to give when demanded, a bill of lading stating "the quantity, character, and condition of the goods" received for transportation, a railroad company incurs the penalty by giving a bill of lading for lumber, describing it merely as "a car-load," when the shipper demands that the weight be stated, and an act of Congress requires a receipt or bill of lading for interstate shipments. But see Missouri &c. R. Co. v. Douglas, 2 Tex. App. Civ. Cas. 32, 16 Am. & Eng. R. Cas. 98, where it is held that the liability is only that of warehouseman until the bill of lading is signed.

[4] See discussion in Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 376, 21 L. ed. 627, 639, and authorities cited therein.

[5] The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779, and cases cited: Wayland v. Mosely, 5 Ala. 430; McTyer v. Steele, 26 Ala. 487; Louisville &c. R. Co. v. Fulgham, 91 Ala. 555, 8 So. 803; Little Rock &c. R. Co. v. Hall, 32 Ark. 669; Richmond &c. R. Co. v. Shomo, 90 Ga. 496, 16 S. E. 220; Central &c. R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Merchants' &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265; Tebbits v. Rock Island &c. R. Co., 49 Ill. App. 567; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244; Long v. New York &c. R. Co., 50 N. Y. 76; Loomis v. New York &c. R. Co., 203 N. Y. 359, 96 N. E. 748, Ann. Cas. 1913A, 928n; 3 Elliott Ev. § 1914. See also as to the dual nature and general features of bills of lading. Morgantown &c. Co. v. Ohio &c. R. Co., 121 N. Car. 514, 28 S. E. 474, 475, 61 Am. St. 679 (citing text); Planters' &c. Co. v. Elden, 101 Fed. 1001; Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; Cleveland &c. Ry. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; note to Chandler v. Sprague, 38 Am. Dec. 407, et seq.; 1 Elliott Ev. § 610. But proof of a collateral parol agreement may be admissible in a proper case. Alabama &c. R. Co. v. Norris, 167 Ala. 311, 52 So. 891 (goods to be shipped through without reloading); Southern R. Co. v. Graddy, 23 Ky. L. 1347, 91

a bill of lading is not issued until after goods are received under an oral contract and is not accepted it does not ordinarily come within this rule prohibiting proof of the verbal contract or parol evidence varying the terms of a written contract.[6] Bills of lading answer a different purpose and perform functions different from those of bills of exchange and promissory notes. The former represent, or constitute symbols of ownership of, the goods they cover, and are not negotiable as commercial paper. While commonly used as security for loans and advances, they are so used only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.[7]

§ 2136 (1416). Power of agent to issue bills of lading.—The railroad company in its capacity of common carrier is bound by the acts and contracts of its agents so long as they are acting within the scope of their authority, and it is also held to be bound by the knowledge thus obtained by such agents.[8] It is held in some jurisdictions that the true limit of a railway agent's authority to bind his company, as between the company and a

S. W. 1125 (special train); Hayes v. Wabash R. Co., 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n (guarantee of connection); Atchison &c. R. Co. v. McCluskey, 30 Okla. 711, 120 Pac. 985 (delivery to connecting carrier). But see note to Loomis v. New York &c. R. Co., 203 N. Y. 359, 96 N. E. 748, Ann. Cas. 1913A, 928n.

[6] Louisville &c. R. Co. v. Meyer, 78 Ala. 597; Baker v. Michigan &c. R. Co., 42 Ill. 73; Missouri &c. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496; Southard v. Minneapolis &c. R. Co., 60 Minn. 382, 62 N. W. 442; Pecos &c. Ry. Co. v. Stinson (Tex. Civ. App.), 181 S. W. 526; post, § 2143.

[7] Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991, 40 Am. & Eng. R. Cas. 70; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Bank of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Missouri &c. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861. See also National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321 and note; Lazard v. Merchants' &c. Co., 78 Md. 1, 26 Atl. 897.

[8] Harmon v. New York &c. R. Co., 28 Barb. (N. Y.) 323. But see Missouri &c. R. Co. v. Belcher, 89 Tex. 428, 35 S. W. 6.

third person, is the apparent authority with which he is invested and which he is known to exercise, and that a fraudulent bill of lading issued by a duly accredited agent binds the company if found in the hands of a bona fide purchaser, the company being estopped to deny the facts there set out.[9] The weight of authority, however, when the matter is not controlled by statute, sustains the view that an agent can not bind the company by issuing a bill of lading where no goods are received.[10] Yet where the transaction is in good faith, it is held that the express authority of the agent need not appear if he receives the goods in the proper place and is in possession of the company's stamps to be used on bills of lading.[11] It has been held that the position of one

[9] Wichita Savings Bank v. Atchison &c. R. Co., 20 Kans. 519; Sioux City &c. R. Co. v. First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488; Bank v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Brooke v. New York &c. R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Dulaney v. Philadelphia &c. R. Co., 228 Pa. St. 180, 77 Atl. 507; ante, § 345; post, § 2139. See also Smith v. Southern Ry., 89 S. Car. 415, 71 S. E. 989, 36 L. R. A. (N. S.) 230n; Thomas v. Atlantic &c. R. Co., 85 S. Car. 537, 64 S. E. 220, 34 L. R. A. (N. S.) 1177n, 21 Ann. Cas. 223.

[10] Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991; Louisville &c. R. Co. v. National Park Bank, 188 Ala. 109, 65 So. 1003; Stone v. Wabash &c. R. Co., 9 Brad. (Ill.) 48; Lake Shore &c. R. Co. v. National Live Stock Bank, 178 Ill. 506, 53 N. E. 326; Union &c. R. Co. v. Yeager, 34 Ind. 1; Hunt v. Mississippi &c. R. Co., 29 La. Ann. 446; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Ryder v. Hall, 7 Allen (Mass.) 456, 83 Am. Dec. 699; National Bank v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566, reviewing most of the authorities on both sides; note to National Bank v. Baltimore &c. R. Co., in 105 Am. St. 347; ante, § 345; post, § 2139, where many other authorities are cited. See also Hass v. Citizens Nat. Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. 61; St. Louis &c. R. Co. v. Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17. But modifications of this rule have been made as to bona fide purchasers or holders by Federal and state Uniform Bills of Lading Acts.

[11] "No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing that he had authority." Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791, citing Kasson v. Noltner, 43 Wis. 646. See also Louisville &c. R. Co. v. Mink, 126 Ky. 337, 103 S. W. 294.

authorized to make contracts for carriage is one of special trust and confidence, and that a bill of lading signed by a substitute is not valid,[12] but it seems to us that this view is questionable as the necessities of commerce may often require the agent to delegate his authority temporarily, otherwise there might be times when traffic from particular stations might be entirely suspended. A general freight agent has power to authorize others to sign bills of lading in his own name and bills so signed are binding upon the principal,[13] whenever they would have bound the principal if signed by the general agent in his own proper person. The subject of the authority of agents to receive freight and execute bills of lading or other contracts for transportation beyond their own lines is fully treated elsewhere.[14]

§ 2137 (1417). Execution of bills of lading.—Bills of lading are usually on printed forms and signed only by the carrier or his agent.[15] Generally the acceptance of the bill by the shipper or his agent[16] is, at least in the absence of fraud, deceit, or mistake,

[12] Pendall v. Rench, 4 McLean (U. S.) 259. But see Hutchings, Sealy & Co. v. Missouri &c. R. Co., 84 Kans. 479, 114 Pac. 1077, 41 L. R. A. (N. S.) 500n.

[13] Bennitt v. The Guiding Star, 53 Fed. 936. See also St. Louis &c. R. Co. v. Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; Hutchings, Sealy & Co. v. Missouri &c. R. Co., 84 Kans. 479, 114 Pac. 1077, 41 L. R. A. (N. S.) 500n; Gulf &c. Ry. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968.

[14] Ante, §§ 2117, 2118; post, § 2166.

[15] Patrick v. Missouri &c. R. Co. (Ind. Ter.), 88 S. W. 330 (citing text). Where the bill is made out by the shipper, his assent to it will be presumed. Lawrence v. New York &c. R. Co., 36 Conn. 63. Where the receipt for goods is taken from a book of blank forms by the shipper and filled in by him, he is presumed to know all stipulations therein contained as to the company's liability for loss or injury to the goods. Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453. In Georgia the shipper is required to sign the bill of lading in order to make special terms of the contract effective. Rhodes &c. Co. v. Continental Furniture Co., 2 Ga. App. 116, 58 S. E. 293. Whether it is signed by the carrier or not is a question of fact for the jury to determine. Royal Canadian Bank v. Grand Trunk R. Co., 23 Upper Can. C. P. 225.

[16] Where the owner leaves goods with an agent to be shipped, he will be bound by the agent's contract with the carrier, though the

conclusive evidence of his assent to its conditions.[17] This subject will be more fully treated when we come to consider contracts limiting the common-law liability of the carrier. It may be well

carrier knew who the owner was. Jennings v. Grand Trunk Ry. Co., 52 Hun 227, 5 N. Y. S. 140, affirmed on appeal in 127 N. Y. 438.

[17] Montague v. The Henry B. Hyde, 82 Fed. 682; Steel v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634; Evansville &c. R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022; Mulligan v. Illinois R. Co., 36 Iowa 181, 14 Am. Rep. 51; Robinson v. Merchants' D. T. Co., 45 Iowa 470; Steamboat "Emily" v. Karney, 5 Kans. 645; Newman v. Smoker, 25 La. Ann. 303; Hoadly v. Northern Transp. Co., 115 Mass. 305; Cox v. Central &c. R. Co., 170 Mass. 129, 49 N. E. 97; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; Kellerman v. Kansas City &c. R. Co., 136 Mo. 177, 34 S. W. 41; Maghee v. Camden &c. R. Co., 45 N. Y. 514, 6 Am. Rep. 124; Germania &c. Co. v. Memphis & C. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Zimmer v. New York Central &c. R. Co., 137 N. Y. 460, 33 N. E. 642; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221; Farnham v. Camden &c. R. Co., 55 Pa. St. 53; Dillard v. Louisville R. Co., 2 Lea (Tenn.) 288; Schaller v. Chicago &c. R. Co., 97 Wis. 31, 71 N. W. 1042. See post, § 2143. As to acceptance of bills by agents see Knell v. United States &c. Co., 1 Jones & S. (23 N. Y. S. C.) 423; Nelson v. Hudson R. Co., 48 N. Y. 498; York Co. v. Central R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117. According to some of the decisions in Massachusetts, Illinois, Georgia, Michigan, Maryland, Mississippi, Ohio and Wisconsin, it seems assent must be affirmatively shown. Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68; Wallace v. Sanders, 42 Ga. 486; Merchants' D. T. Co. v. Joesting, 89 Ill. 152; Chicago &c. Ry. Co. v. Calumet &c., 194 Ill. 9, 61 N. E. 1095; Baltimore &c. R. Co. v. Brady, 32 Md. 333; McCoy v. Erie &c. Co., 42 Md. 498; Perry v. Thompson, 98 Mass. 249; American T. Co. v. Moore, 5 Mich. 368, 7 Am. Law Reg. (O. S.) 352; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Gaines v. Union T. Co., 28 Ohio St. 418; Boorman v. American Ex. Co., 21 Wis. 153; White v. Goodrich &c. Co., 46 Wis. 493, 1 N. W. 75. See post, § 2257; also Cleveland &c. R. Co. v. C. A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685. As to consignor's agents in these states, see Falvey v. Northern Transp. Co., 15 Wis. 129; Fillibrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606. And see to effect that it is not presumed where goods are received and shipped under a verbal contract and a bill of lading containing different terms is subsequently issued. Pecos &c. Ry. Co. v. Stinson (Tex. Civ. App.), 181 S. W. 526; 4 R. C. L. 779, § 240; ante, § 2135, n. 6.

to add, however, in this connection, that, unless required by statute, the bill of lading need not be signed by the shipper,[18] and that the contract may even rest in parol.[19] Indeed, the complete delivery of goods, properly directed, which the carrier is required by law to accept and carry is generally sufficient to render the company responsible for their transportation in accordance with its common-law duties. The execution of a bill of lading by the carrier with a blank left for the name of the consignee, has been held to be equivalent to a contract to deliver to the consignor or his assignee,[20] and where two papers are executed together as a bill of lading, one party signing one, and the other party signing the other, both should be construed together as constituting the entire contract.[21]

§ 2138 (1418). **Premature issuance of bill.**—If a bill of lading, through inadvertence or otherwise, be signed before the goods are actually shipped, and afterwards certain goods are delivered to the carrier as and for the goods receipted for, the bill may operate on those goods as between the shipper and the carrier by way of relation and estoppel.[22] But, although a bill of lading

[18] Piedmont &c. Co. v. Columbia &c. R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221; Adams Exp. Co. v. Haynes, 42 Ill. 89. But see under the Dakota statute, Hartwell v. Northern Pac. Exp. Co., 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342. And see under Georgia law, Rhodes &c. Co. v. Continental Furniture Co., 2 Ga. App. 116, 58 S. E. 293.

[19] Roberts v. Riley, 15 La. Ann. 103; Missouri &c. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Louisville &c. R. Co. v. Craycraft, 12 Ind. App. 203, 39 N. E. 523; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527. But where there was no evidence but a paper called a bill of lading which was not signed even by the carrier, it was held that there was no contract limiting the liability of the carrier notwithstanding such paper contained provisions to that effect. Patrick v. Missouri &c. R. Co., 5 Ind. Ter. 742, 88 S. W. 330, 333. See however for modification of the decision in this case, Missouri &c. R. Co. v. Patrick, 144 Fed. 632, holding the decision of the court in the Indian Territory erroneous on this point.

[20] Garden Grove Bank v. Humeston &c. R. Co., 67 Iowa 526, 25 N. W. 761.

[21] Richmond &c. R. Co. v. Shomo, 90 Ga. 496, 16 S. E. 220.

[22] Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; The

has been issued acknowledging the receipt of the goods the company may, at least as between the parties, show that they have not been delivered to it, if such is the fact.[23] In some of the states it is provided by statute that no bill of lading shall be issued until the goods are actually delivered to the carrier. It has been held, under such a statute, that a bill of lading reciting that the goods have been received for transportation when they have not been received and are in fact in possession of another company is void.[24]

§ 2139 (1419). **Bills of lading as evidence of receipt of goods —Bona fide purchasers.**—Bills of lading are only prima facie evidence between the original parties that the goods have actually come into the carrier's custody, and like other receipts are open to explanation, modification or contradiction by parol.[25] The

Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; The Idaho, 93 U. S. 575, 23 L. ed. 978; The Bark Edwin, 1 Sprague (U. S. Dist.) 477.

[23] Post, § 2139. So, according to the weight of authority, even as against third persons, where the company has done nothing to mislead them or create an estoppel. Post, § 2139. And see ante, § 2136.

[24] Aetna Nat. Bank v. Water Power Co., 58 Mo. App. 532. See also Stone v. Wabash &c. R. Co., 9 Ill. App. 48; Martin v. Railway Co., 55 Ark. 510, 19 S. W. 314.

[25] The Loon, 7 Blatch. (U. S.) 244; The Lady Franklin, 8 Wall. (U. S.) 325, 19 L. ed. 455; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; Brouty v. Five &c. Elm Staves, 21 Fed. 590; Cunard S. S. Co. v. Kelley, 115 Fed. 678; Peck v. Dinsmore, 4 Porter (Ala.) 212; Wayland v. Mosely, 5 Ala. 430, 39 Am. Dec. 335; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145; Southern Ex. Co. v. Hess, 53 Ala. 19; Northern Transp. Co. v. McClary, 66 Ill. 233; Lake Shore &c. R. Co. v. National &c. Bank, 178 Ill. 506, 53 N. E. 326; Kirkman v. Bowman, 8 Rob. (La.) 246; Flower v. Downs, 12 Rob. (La.) 101; Fellows v. Steamer Powell, 16 La. Ann. 316, 79 Am. Dec. 581; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; O'Brien v. Gilchrist, 34 Maine 554, 56 Am. Dec. 676; Wetzler v. Collins, 70 Maine 290, 35 Am. Rep. 327; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Southern Ex. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Louisiana Bank v. Laveille, 52 Mo. 380; White v. Van Kirk, 25 Barb. (N. Y.) 16; Ellis v. Willard, 9 N. Y. 529; Meyer v. Peck, 28 N. Y. 590; Abbe v. Eaton, 51 N. Y. 410; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. 630; Wood v. Perry, 1 Wright (Ohio) 240; National Bank v. Walbridge, 19 Ohio St. 419; Dean v. King, 22 Ohio St. 118; Cafiero v. Welsh, 8 Phila.

receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.[62] And so it is held that a recovery can not be had even by an innocent and bona fide holder for value against a common carrier for goods never actually in its possession for transportation, though one of its agents, with authority to sign bills of lading, had, through fraud, mistake or negligence, issued a bill of lading.[27] While this view has the weight of authority the contrary is maintained in some

(Pa.) 130; Jones v. Walker, 5 Yerger (Tenn.) 427; Berkley v. Watling, 7 Ad. & El. 29. See also 1 Elliott Ev. § 610, 3 Elliott Ev. §§ 1913, 1914. It is competent for the carrier to show that the shipper had no such goods as those receipted for, or that, having the goods, they were never delivered to the carrier. 2 Am. & Eng. Encyc. of L. 224, citing, among other cases, Hubbersty v. Ward. 8 Ex. 330; Sears v. Wingate, 3 Allen (Mass.) 103; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Hunt v. Mississippi &c. R. Co., 29 La. Ann. 446. It is no objection to the bill as evidence that it acknowledges the receipt of other goods in addition to those concerning which the suit is brought. Wallace v. Vigus, 4 Blackf. (Ind.) 260. A railroad company is not precluded from denying the receipt of the goods, it having accepted a warehouse receipt as evidence of the shipper's goods, in the faith that they would be delivered. Hazard v. Illinois C. R. Co., 67 Miss. 32, 7 So. 280, 42 Am. & Eng. R. Cas. 455.

[26] Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; St. Louis, I. M. & S. R. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Miller v. Hannibal &c. R. Co., 90 N. Y. 430, 43 Am. Rep. 179. See also Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944.

[27] Schooner Freeman v. Buckingham, 18 How. (U. S.) 182, 191, 15 L. ed. 341; The Lady Franklin, 8 Wall. (U. S.) 325, 19 L. ed. 455; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; St. Louis, I. M. & S. R. R. Co. v. Knight, 122 U. S. 79, 87, 7 Sup. Ct. 1132, 30 L. ed. 1077; Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991, 5 Railway & Corp. L. J. 507, 28 Cent. L. J. 503, and note, 40 Am. & Eng. R. Cas. 70; Stone v. Wabash &c. R. Co., 9 Brad. (Ill.) 48; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Sears v. Wingate, 3 Allen (Mass.) 103; National Bank of Commerce v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 560 (reviewing most of the authorities), 20 Am. St. 566; Swedish Am. Nat. Bank v. Railway Co., 96 Minn. 436, 105 N. W. 69; Louisiana Bank v. Laveille, 52 Mo.

of the states,[28] and the general rule has been modified by the

380; Williams v. Wilmington &c. R. Co., 93 N. Car. 42, 53 Am. Rep. 450; Roy v. Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302; Coleman v. Riches, 16 Com. B. 104; Meyer v. Dresser, 16 Com. B. (N. S.) 646; McLean v. Fleming, L. R. 2 H. L. Sc. 128; Jessel v. Bath, 2 Exchq. (L. R.) 267; Bates v. Todd, 1 Moo. & R. 106; Lickbarrow v. Mason, 2 T. R. 63; Brown v. Powell D. S. Co., L. R. 10 C. P. 562; Grant v. Norway, 10 C. B. 665; Hubbersty v. Ward, 8 Exch. 330; Cox v. Bruce, 18 L. R. Q. B. D. 147; note in 105 Am. St. 347, et seq.; ante § 2136. In some states statutes have been passed making the bills of lading in the hands of innocent purchasers conclusive evidence of the receipt of the goods mentioned. See Hazard v. Illinois &c. R. Co., 67 Miss. 32, 7 So. 280, 42 Am. & Eng. R. Cas. 455, where it is held that the Mississippi act of 1886 is not retroactive, as it is not a mere rule of evidence, but changes the character and legal effect of the contract evidenced by the bill of lading. See also Lloyd v. Kansas City &c. R. Co., 88 Miss. 422, 40 So. 1005; Illinois R. Co. v. Lancashire Ins. Co., 79 Miss. 114, 30 So. 43; Watkins Nat. Bank v. Cleveland R. R. Co., 117 Mo. App. 248, 93 S. W. 846; Smith v. Missouri &c. R. Co., 74 Mo. App. 48. For cases in which the statute was held not to apply see Lazard v. Merchants &c. Co., 78 Md. 1, 26 Atl. 897; The Guiding Star, 62 Fed. 407; Jasper Trust Co. v. Kansas City &c. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. 75. See also Henderson v. Louisville &c. R. Co., 116 La. Ann. 1047, 41 So. 252.

[28] See an able opinion by Finch, J., in Bank of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, 32 Am. & Eng. R. Cas. 497. See also Brooke v. New York &c. R. Co., 108 Pa. St. 529, 56 Am. Rep. 235, 21 Am. & Eng. R. Cas. 64; Wichita S. Bank v. Atchison &c. R. Co., 20 Kans. 519; Sioux City &c. R. Co. v. First N. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488, 1 Am. & Eng. R. Cas. 278; Meyer v. Peck, 28 N. Y. 590; Armour v. Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Miller v. Hannibal &c. R. Co., 24 Hun. 607, reversed 90 N. Y. 430, 43 Am. Rep. 179, 12 Am. & Eng. R. Cas. 30; Palmetto Fertilizer Co. v. Columbia &c. Ry. Co., 99 S. Car. 187, 83 S. E. 36; ante, § 2136. It has been held that a railroad company having given a bill of lading reciting that the property is then lying in a depot at a certain place, and having agreed to forward it to the consignee, is estopped as against assignees of such bill who advance money on the faith thereof, from showing that at the time of giving such bill of lading the goods were in the adverse possession of another person. St. Louis &c. R. Co. v. Larned, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436. See also Tibbits v. Rock Island &c. Co., 49 Ill. App. 567; Henderson v. Railroad Co., 116 La. Ann. 1047, 41 So. 252; Roy v. Railroad Co., 42

Federal Uniform Bill of Lading Act and some of the state statutes.[29] It is held in Alabama that the carrier is liable to a bona fide purchaser of a bill of lading issued without having received the goods, under a statute providing that the carrier shall be liable to any person injured by issuing a bill of lading or receipt for things or property not received, but is not liable in such a case where the bill of lading is issued by the carrier's agent to a fictitious person and indorsed by such agent in the name of the fictitious person to one who is thus put upon inquiry.[30]

§ 2140 (1420). As evidence of condition, weight, or contents. —Bills of lading are only prima facie evidence between the original parties as to the condition of goods received for transportation, their statements that the goods are in "good order," or "apparent good order," being taken to refer only to the apparent external condition.[31] And similarly, a statement in a receipt for

Wash. 572, 85 Pac. 53; Dean v. Driggs, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302 and note, 33 Am. St. 721; St. Louis &c. R. Co. v. Adams, 4 Kans. App. 305, 45 Pac. 920.

[29] See last section of this chapter.

[30] Jasper Trust Co. v. Kansas City &c. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. 75; Bank of Tupelo v. Kansas City &c. R. Co. (Miss.), 16 So. 572.

[31] The Bark Olbers, 3 Ben. (U. S. C. C.) 148; Nelson v. Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; Bradstreet v. Heran, 2 Blatch. (U. S.) 116; The Adriatic, 16 Blatch. (U. S.) 424; Choate v. Crowninshield, 3 Cliff. (C. C.) 184; Ship Howard v. Wissman, 18 How. (U. S.) 231, 15 L. ed. 363; The Oriflamme, 1 Sawyer (U. S.) 176; St. Louis, I. M. & S. R. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077, 30 Am. & Eng. R. Cas. 88; Whitman v. Vanderbilt, 75 Fed. 422; St. Louis &c. R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963; Bissel v. Price, 16 Ill. 408; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Chicago &c. R. Co. v. Benjamin, 63 Ill. 283; Carson v. Harris, 4 Greene (Iowa) 516; Mitchell v. United States Ex. Co., 46 Iowa 214; Keith v. Amende, 1 Bush (Ky.) 455; Gowdy v. Lyon, 9 B. Mon. (Ky.) 112; Kimball v. Brander, 6 La. 711; O'Brien v. Gilchrist, 34 Maine 554, 56 Am. Dec. 676; Hastings v. Pepper, 11 Pick. (Mass.) 41; Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45; Richards v. Doe, 100 Mass. 524; Hazard v. Illinois Cent. R. Co., 67 Miss. 32, 7 So. 280; Arend v. Liverpool &c. Co., 64 Barb. (N. Y.) 118; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Ellis v. Willard, 9 N. Y. 529; Meyer v. Peck, 28 N. Y. 590; St.

goods signed by the consignee that the goods were delivered to him by the carrier in good condition is a mere admission, and is not conclusive.[32] Specifications as to weight or quality are prima facie evidence only,[33] being subject to contradiction by

Louis &c. R. Co. v. Jamieson, 20 Okla. 654, 95 Pac. 417; Seller v. Steamship Pacific, 1 Ore. 409; Goodman v. Oregon &c. Co., 22 Ore. 14, 28 Pac. 894; Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693; The Prosperino Palasso, 29 L. T. N. S. 622. See also Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; International &c. R. Co. v. Shands (Tex. Civ. App.), 93 S. W. 1105; Bath v. Houston &c. R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993; Gulf &c. R. Co. v. Holder, 10 Tex. Civ. App. 223, 30 S. W. 383; Missouri &c. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692 (so as to recital in way bill or the like.) The legal effect of "apparent good order" and "good order" is the same. The Oriflamme, 1 Sawyer (U. S.) 176; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148; Blade v. Chicago &c. R. Co., 10 Wis. 4. As to pencil interlineation as to bad order, see Goodman v. Oregon, R. & Co., 22 Ore. 14, 28 Pac. 894. It may be shown that the carrier wished to receipt for the goods as in poor condition but was not permitted to do so. Tierney v. New York &c. R. Co., 67 Barb. (N. Y.) 538. The burden of rebutting the presumption that the goods were in the condition specified in the bill is on the carrier. Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Breed v. Mitchell, 48 Ga. 533; Atlantic &c. R. Co. v. Cohn & Co., 6 Ga. App. 572, 65 S. E. 355; Whitney v. Gauche, 11 La. Ann. 432; Tarbox v. East S. B. Co., 50 Maine 339; Austin v. Talk, 20 Tex. 164; The Freedom, L. R. 3 P. C. 594. See as to estoppel of carrier as against innocent purchaser for value where it knowingly misrepresents the fact in so stating, New York Millinery & Supply Co. v. Hamburg &c., 171 Fed. 577.

[32] Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693.

[33] McLean v. Fleming, L. R. 2 H. L. (Sc.) 128, 25 L. T. N. S. 317; Hall v. Grand T. R. Co., 34 U. C. Q. B. 517; Horseman v. Grand Trunk R. Co., 31 U. C. Q. B. 535; Cox v. Bruce, L. R. 18 Q. B. D. 147. A custom to treat statement of quantity as conclusive is unreasonable and void. Strong v. Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184. But see Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. 859, affirming 59 Hun 616, 12 N. Y. S. 669, and holding that where a carrier executes a bill of lading acknowledging the receipt of a certain quantity of wheat on board, which was weighed under the supervision of the carrier, and providing that "all the deficiency in the cargo shall be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," such carrier must pay for any deficiency in the quantity acknowledged by the bill of

parol.[34] Particularly if the specifications are, in another part of the bill, qualified by the insertion of some such statement as "contents unknown," is the carrier not responsible for the discrepancy between the goods delivered and those described, having safely delivered the very goods it actually received.[35] And

lading to have been received, and this may be deducted by the consignee from the gross amount of freight earned by the carrier, although it delivers all the wheat it actually did receive.

[34] The J. W. Brown, 1 Biss. (U. S.) 76; Little Rock &c. R. Co. v. Hall, 32 Ark. 669; Naugatuck R. Co. v. Beardsley S. Co., 33 Conn. 218; Steamboat Wisconsin v. Young, 3 Greene (Iowa) 268; Kirkman v. Bowen, 8 Rob. (La.) 246; Hall v. Mayor, 7 Allen (Mass.) 454; Lane v. Boston &c. R. Co., 112 Mass. 455; Strong v. Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184; Erb v. Keokuk P. Co., 43 Mo. 53; Graves v. Harwood, 9 Barb. (N. Y.) 477; Meyer v. Peck, 28 N. Y. 590, 33 Barb. (N. Y.) 532; Abbe v. Eaton, 51 N. Y. 410; Dean v. King, 22 Ohio St. 118; Glass v. Goldsmith, 22 Wis. 488; Manchester v. Milne, Abb. Adm. 115; Goodrich v. Norris, Abb. Adm. 196; Blanchet v. Powell's Collieries Co., 9 L. R. Ex. 74; Bates v. Todd, 1 Moody & Rob. 106. The burden of the contradiction is usually on the carrier. McLean v. Fleming, L. R. 2 H. L. (Sc.) 128, 25 L. T. (N. S.) 317; Brown v. Missouri &c. R. Co., 83 Kans. 574, 112 Pac. 147. But compare McCready v. Holmes, 6 Am. L. Reg. 229. A fraudulent and mistaken statement in a bill of lading that the weight is less than it actually is will not prevent the carrier from recovering for the whole amount carried, according to the rate per hundred pounds stated in the bill. Baird v. St. Louis &c. R. Co., 41 Fed. 592, 42 Am. & Eng. R. Cas. 281. In this case it was held that the Arkansas statute providing that no carrier shall charge a greater sum for transporting freight than is specified in the bill of lading, was not intended to give validity to stipulations which were the result of mistake or fraud, and that the material part of the bill of lading was the part which fixed the rate per 100 pounds, and the weight stated did not control. It has also been held that a statute making the statement of the weight in the bill of lading absolutely conclusive is unconstitutional. Missouri &c. R. Co. v. Simonson, 64 Kans. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. 248. But see as agreement that bill of lading shall be conclusive as between the parties, or guaranty of quantity. Sawyer v. Cleveland Iron &c. Co., 69 Fed. 211; Bissell v. Campbell, 54 N. Y. 353; Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. 859.

[35] Vaughan v. Six &c. Casks of Wine, 7 Ben. (U. S.) 506; The Colombo, 3 Blatch. (U. S.) 521; St. Louis, I. M. & S. R. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077, 30 Am. & Eng. R. Cas. 88; The La Kroma, 138

the use of the words "more or less" relieves the carrier from responsibility for the exact quantity mentioned if it fails to coincide with the quantity shipped.[36] The carrier may, however, by the insertion of such a phrase as "quantity guaranteed," bind itself conclusively.[37]

Fed. 936; Fassett v. Ruark, 3 La. Ann. 694; Levois v. Gale, 17 La. Ann. 302; Clark v. Barnwell, 12 How. (N. Y.) 272; Miller v. Hannibal &c. R. Co., 90 N. Y. 430, 43 Am. Rep. 179, reversing 24 Hun 607; Haddow v. Parry, 3 Taunt. 303; Jessel v. Bath, L. R. 2 Exch. 267. A bill for a certain number of tons of scrap iron, "marked and numbered as per margin," and concluding, "weight unknown to" the master, binds the ship-owner to deliver only so much as was actually shipped. Shepherd v. Naylor, 5 Gray (Mass.) 591. See also St. Louis, I. M. & S. R. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077, 30 Am. & Eng. R. Cas. 88. "Under the clause 'weight unknown,' the statement of 'three hundred tons' in the bill of lading was not even prima facie evidence as to the weight against the ship when it appeared that all that was received was delivered." Henderson v. Three &c. Tons of Iron Ore, 38 Fed. 36. See also The Ismeale, 14 Fed. 491, 22 Fed. 559; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Matthissen v. Gusi, 29 Fed. 794; Vernard v. Hudson, 3 Sumn. (C. C.) 405; Baxter v. Leland, Abb. Adm. 348; Lebeau v. General &c. Navigation Co., L. R. 8 C. P. 88; The Peter der Grosse, L. R. 1 Prob. Div. 414. A weighmaster's certificate, not itself legal evidence, is insufficient to show a shortage in a cargo, where the master, before signing the bill of lading, wrote upon it, "I do not know the weight or quality." The Pietro G., 38 Fed. 148.

[36] O'Brien v. Gilchrist, 34 Maine 554, 56 Am. Dec. 676; Shepherd v. Naylor, 5 Gray (Mass.) 591; Dean v. King, 22 Ohio St. 118; Winterport G. & B. Co. v. Schooner Jasper, 1 Holmes (C. C.) 99. A bill of lading, in which the carrier agrees to deliver "twenty-two hundred and eighty-two bushels of corn, more or less, all to be delivered," is complied with by the delivery of 2217 bushels, if no more was shipped. Kelley v. Bowker, 11 Gray (Mass.) 428, 71 Am. Dec. 725. See also Peebles v. Boston &c. R. Co., 112 Mass. 498.

[37] Bissel v. Campbell, 54 N. Y. 353; Byrne v. Weeks, 7 Bosw. (N. Y.) 372. See also Sawyer v. Cleveland &c. Co., 69 Fed. 211; Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 941, 22 Am. St. 859; Steamship Co. v. Mackay (1903), 1 K. B. Div. 297, 72 L. J. K. B. 147. And see as to estoppel of carrier as against innocent purchaser, Palmetto Fertilizer Co. v. Columbia &c. Ry. Co., 99 S. Car. 182, 83 S. E. 36; and compare Southern R. Co. v. Simpkins Co., 178 N. Car. 273, 100 S. E. 418. See also for prohibition in Federal Bill of Lading Act, secs. 20 and 21, of use of words "shippers weight,

§ 2141 (1421). **As evidence of value.**—The shipper, when tendering goods for transportation, is not bound to disclose their value for insertion in the bill of lading, unless requested to do so.[38] If, however, he be requested to give the value he must do so truly,[39] else the carrier may be absolved from liability at least for any excess over the value given.[40] And he must not, by any subterfuge, deceive the carrier as to the value of the proffered goods.[41] A stipulation as to value, however, in a bill of lading

load and count" and the like, when goods are loaded by carrier.

[38] Southern Ex. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Merchants' D. T. Co. v. Bolles, 80 Ill. 473; Levois v. Gale, 17 La. Ann. 302; Phillips v. Earle, 8 Pick. (Mass.) 182; Gorham Mfg. Co. v. Fargo, 45 How. Pr. (N. Y.) 90; Warner v. West T. Co., 5 Rob. (N. Y.) 490; Baldwin v. Liverpool &c. Co., 74 N. Y. 125, 30 Am. Rep. 277; Relp v. Rapp, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528; Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Brooke v. Pickwick, 4 Bing. 218. See also Kember v. Southern Ex. Co., 22 La. Ann. 158, 2 Am. Rep. 719; Southern Ex. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Stoneman v. Erie R. Co., 52 N. Y. 429; Tudor v. Macomber, 14 Pick. (Mass.) 34. The failure of the shipper to disclose the value does not permit the carrier to rely upon a stipulation in the bill of lading limiting his liability to a stated amount, he having actually known, but failed to enter, the value. Kember v. Southern Ex. Co., 22 La. Ann. 158, 2 Am. Rep. 719; Southern Ex. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Stoneman v. Erie R. Co., 52 N. Y. 429.

[39] Boskowitz v. Adams Ex. Co., 5 Cent. L. Jour. 58; Green v. Southern Ex. Co., 45 Ga. 305; Little v. Boston &c. R. Co., 66 Maine 239.

[40] Muser v. American Ex. Co., 1 Fed. 382; Mather v. American Ex. Co., 2 Fed. 49; Hopkins v. Westcott, 6 Blatch. (C. C.) 64; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470-n; Houston &c. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808. The words "said to contain" so much money do not constitute even prima facie evidence against the carrier as to the amount actually received. Fitzgerald v. Adams Ex. Co., 24 Ind. 447, 87 Am. Dec. 341. See Weil v. Express Co., 7 Phila. (Pa.) 88.

[41] Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Chicago &c. R. Co. v. Thompson, 19 Ill. 578; Cincinnati &c. R. Co. v. Marcus, 38 Ill. 219; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Houston &c. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808; Gibbon v. Paynton, 4 Burr. 2298; Great N. R. Co. v. Shepherd, 14 Eng. L. & E. R. 367; Lebeau v. General S. N. Co., 8 L. R. C. P. 88.

given by the carrier has been held not to be binding upon the shipper unless he agreed to it.[42] So, of course, the valuation given by the shipper and stated in the bill of lading is not conclusive, as against the carrier and in favor of the shipper that the goods are worth that much. The construction of a written contract is usually for the court, but it has been held that where the bill of lading acknowledged the receipt for transportation of "one horse, value $100; one colt," it was for the jury to determine whether the value given was intended to be that of the horse alone or both the horse and colt.[43]

§ 2142 (1422). **Misdescription in bill.**—Generally the damages resulting from a misdescription of goods in the bill of lading must be borne by the carrier or shipper, according as the one or the other is responsible for it.[44] And a misdescription of goods by the carrier, with knowledge of what they are, is usually not binding upon the shipper so as to release the carrier from responsibility for the goods actually received.[45] The statement of the route and place of delivery in the bill of lading will control the marks on the goods and be generally accepted as evidence, showing the contract of the parties.[46] So, where the goods are misdirected by the shipper, and are lost by reason thereof, without the fault of the carrier, the latter is not liable therefore.[47] And in case of mistake in the bill of lading, binding the carrier to de-

[42] Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066.

[43] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870.

[44] Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Chicago &c. R. Co. v. Thompson, 19 Ill. 578; American Exp. Co. v. Perkins, 42 Ill. 458; Chicago & A. R. Co. v. Shea, 66 Ill. 471; McCune v. Burlington &c. R. Co., 52 Iowa 600, 3 N. W. 615; Fassett v. Ruark, 3 La Ann. 694; Hyde v. New York &c. S. S. Co., 17 La. Ann. 29; McCoy v. E. & W. T. Co., 42 Md. 498; New Jersey &c. Co. v. Pennsylvania R. Co., 3 Dutch. (N. J.) 100; Southern Exp. Co. v. Womack, 1 Heisk. (Tenn.) 256.

[45] Harmon v. N. Y. &c. R. Co., 28 Barb. (N. Y.) 323; Bancroft v. Peters, 4 Mich. 619.

[46] More v. Henry, 18 Mo. App. 35.

[47] Lake Shore &c. R. Co. v. Hodapp, 83 Pa. St. 22; Congar v. Chicago &c. R. Co., 24 Wis. 157, 1 Am. Rep. 164; Southern Exp. Co. v. Kaufman, 12 Heisk. (Tenn.) 161, 25 Am. Rep. 451; Erie R. Co. v. Wilcox, 84 Ill. 239; Stimson v. Jackson, 58 N. H. 138.

liver at an inconvenient and expensive place, it has been held that this may be explained by parol evidence.[48]

§ 2143 (1423). **As evidence of contract—Not variable by parol.** —In the absence of fraud or mistake, the well settled general rule is that it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, the route, and the rate at which they were forwarded, are merged in the bill of lading. This must be taken as the final repository and the sole evidence of the agreement between the parties.[49] The bill of lading being silent in respect to

[48] Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. 294. See also Swank v. San Antonio &c. R. Co., 1 Tex. Civ. App. 675, 23 S. W. 249.

[49] The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; The Caledonia, 43 Fed. 681; Peck v. Dinsmore, 4 Por. (Ala.) 212; Wayland v. Mosely, 5 Ala. 430, 39 Am. Dec. 335; Louisville &c. Co. v. Fulgham, 91 Ala. 555, 8 So. 803; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473; Bedell v. Richmond &c. R. Co., 94 Ga. 22, 20 S. E. 262; McElveen v. Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. 371; United States Exp. Co. v. Haines, 67 Ill. 137; Chicago &c. R. Co. v. Northern &c. Co., 70 Ill. 217; Merchants' D. T. Co. v. Leysor, 89 Ill. 43; Indianapolis &c. R. Co. v. Remmy, 13 Ind. 518; Hall v. Penn. Co., 90 Ind. 459; Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341; Wilde v. Merchants' Dispatch &c. Co., 47 Iowa 272; Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790; Center v. Torrey, 8 Mart. (La.) 206; Sproat v. Donnell, 26 Maine 185, 45 Am. Dec. 103; Shaw v. Gardner, 12 Gray (Mass.) 488; Knowles v. Dabney, 105 Mass. 437; O'Bryan v. Kinney, 74 Mo. 125; St. Louis &c. R. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13; Kellerman v. Kansas City &c. R. Co., 136 Mo. 177, 34 S. W. 41; Turner v. St. Louis &c. R. Co., 20 Mo. App. 632; Whitnack v. Chicago &c. R. Co., 82 Nebr. 464, 118 N. W. 67, 19 L. R. A. (N. S.) 1011, 130 Am. St. 692 and notes; White v. Van Kirk, 25 Barb. (N. Y.) 16; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Hinckley v. New York &c. R. Co., 56 N. Y. 429; Germania F. I. Co. v. Memphis &c. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Guillaume v. General T. Co., 100 N. Y. 491; Lawrence v. McGregor, Wright (Ohio) 193; May v. Babcock, 4 Ohio 334; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Shaw v. Merchants' Nat. Bank, 8 W. N. C. (Pa.) 221; Arnold v. Jones, 26 Tex. 335, 82 Am. Dec. 617; Davis v. Central Vt. R.

the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as any of the other express terms of the contract.[50] Where, however, goods are received and actually shipped under a parol contract, the subsequent issuance of a bill of lading does not preclude the shipper from showing the terms of the parol contract,[51] unless it appears that between the shipper and

Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852, 61 Am. & Eng. R. Cas. 197. In the case of Union &c. Co. v. Riegel, 73 Pa. St. 72, it was held that where certain parol arrangements were made at the time the bill was signed, both should be submitted to the jury to enable it to determine which was the contract. See also Atwell v. Miller, 11 Md. 348, 69 Am. Dec. 206. But in Hostetter v. Baltimore &c. R. Co. (Pa.), 11 Atl. 609, the court upheld the refusal of an instruction that a bill of lading on its face was but a memorandum, and not in form a contract inter partes, and oral testimony might be received to show the real contract.

[50] White v. Ashton, 51 N. Y. 280; Hinckley v. New York &c. R. Co., 56 N. Y. 429; Sinkins v. Norwich &c. S. Co., 11 Cush. (Mass.) 102; Hudson C. Co. v. Penn. C. Co., 8 Wall. (U. S.) 276, 19 L. ed. 349; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702. Where the bill is silent as to the time of shipment, the implied obligation to ship within a reasonable time after the goods are delivered is a part of the contract, and can not be modified by parol evidence of an undertaking to ship on a certain train. Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586 (distinguishing Cincinnati &c. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797); Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Gulf &c. R. Co. v. Baugh (Tex. Civ. App.), 42 S. W. 245. See also Sproat v. Donnell, 26 Maine 103.

[51] Wheeler v. New Brunswick & C. R. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061-1160, 29 L. ed. 341; Burns v. Burns, 131 Fed. 238; St. Louis &c. R. Co. v. Elgin &c. Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Wilde v. Merchants' &c. Co., 47 Iowa 247, 29 Am. Rep. 479; Stoner v. Railway Co., 109 Iowa 551, 80 N. W. 569; Hendrick v. Railroad Co., 170 Mass. 44, 48 N. E. 835; Rudell v. Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; McCullough v. Wabash &c. R. Co., 34 Mo. App. 23; Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712; Guillaume v. General T. Co., 100 N. Y. 491, 3 N. E. 489; Swift v. Pacific &c. Steamship Co., 106 N. Y. 206, 12 N. E. 583; Waldron v. Fargo, 170 N. Y. 130, 62 N. E.

the carrier the established custom has been for the former to receive bills of lading constituting the contract after the shipment.[52] Neither does the acceptance of a bill of lading on a subsequent shipment of goods waive the right to damages for the violation of a contract for an earlier supply of the necessary cars for the shipment of the same goods.[53] And, in some instances,

1077. See also Railway Co. v. Botts, 22 Tex. Civ. App. 609, 55 S. W. 514. A bill of lading modifying a previous parol contract, accepted by the shipper without noticing the charges does not supersede the latter which may be proved by the shipper. Missouri &c. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496. A shipper alleged and testified that the shipment was made under a parol agreement, without limitation of liability, for carriage to a point beyond the defendant's line, and that, after the stock was loaded and had left the station, he signed a paper which he could not well read, and did not read, but which he supposed to be a receipt. The company contended and offered testimony to show, that the only contract made with the shipper was the written one embodied in the bill of lading signed by the shipper, and which, to a great extent, limited the liability of the company. It was held that the court was warranted in submitting to the jury the question of what constituted the contract of the parties, and in defining what the common law liability of the company was, in case they should find in favor of the theory of the shipper. St. Louis &c. R. Co. v. Clark, 48 Kans. 321, 329, 29 Pac. 312. As to when the conditions in a bill of lading govern when referred to in a shipping ticket or receipt although the bill of lading is not issued at the time, see Cincinnati &c. R. Co. v. Berdan & Co., 22 Ohio C. C. 326; Wilde v. Merchants' &c. Co., 47 Iowa 247; but compare Cleveland &c. R. Co. v. C. A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685. And see generally as to such receipts, Merchants &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265; Pittsburgh &c. R. Co. v. Bryant, 36 Ind. App. 340, 75 N. E. 829; Dunbar v. Railway Co., 62 S. Car. 414, 40 S. E. 884.

[52] Shelton v. Merchants' D. T. Co., 59 N. Y. 258. Or unless the shipper knowingly accepts the bill of lading as containing the true contract. The Arctic Bird, 109 Fed. 167; Northern &c. R. Co. v. American &c. Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269; Evansville &c. R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022. This is certainly true where the bill is knowingly accepted before the alleged parol contract is acted on. Railroad Co. v. Batte (Tex. Civ. App.), 94 S. W. 345. Compare, however, Farmers' L. & T. Co. v. Northern Pac. R. Co., 120 Fed. 873.

[53] McAbsher v. Richmond &c. R. Co., 108 N. Car. 344, 12 S. E. 892; Hamilton v. Western &c. R. Co., 96 N. Car. 398, 3 S. E. 164; Gulf

a collateral or distinct verbal contract may be valid or a new contract may be made by parol.[54] A bill of lading, under the rules applicable to other written contracts, may be explained by parol if ambiguous,[55] or, sometimes, if subject to a usage which is annexable to the contract as an incident, may be explained by usage.[56] And, in accordance with the rule that written contracts may be modified, changed or rescinded by a new and valid parol contract at any time after their execution, it is competent to prove that the contract embodied in a bill of lading was abandoned and the goods shipped under a parol contract subsequently made.[57] So fraud or mistake may be shown by parol evidence in a proper case.[58]

&c. R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110. See also St. Louis &c. R. Co. v. Elgin &c. Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238; Pittsburgh &c. v. Racer, 10 Ind. App. 503, 37 N. E. 280. But compare Helm v. Railroad, 98 Mo. App. 419, 72 S. W. 148.

[54] Alabama &c. R. Co. v. Norris, 167 Ala. 311, 52 So. 891; St. Louis &c. R. Co. v. Elgin &c. Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238; Toledo &c. R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Louisville &c. R. Co. v. Crayeraft, 12 Ind. App. 203, 39 N. E. 523; Hayes v. Wabash R. Co., 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n; Steide v. Minneapolis &c. R. Co., 94 Minn. 233, 102 N. W. 701; 2 Elliott Cont. §§ 1633, 1634, 1640.

[55] The Wanderer, 29 Fed. 260; The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779. The meaning of C. O. D. may be shown by parol. American Ex. Co. v. Lesem, 39 Ill. 312. In Savannah &c. R. Co. v. Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. 87, goods were received for transportation to a point beyond the company's line, and the following receipt issued: " . . . Received from J. . . . the following articles for shipment to W., Cedar Keys, Fla.: 1 bdl. bedding. [Name.] Care R. R. Agt., Callahan. [Signed] D., Agt." In an action to recover for the loss of the goods, it was held that the words, "Care R. R. Agt., Callahan," are ambiguous, and that they may be explained by parol evidence. See also Louisville &c. R. v. Southern Flour &c. Co., 136 Ga. 538, 71 S. E. 884; Central &c. R. Co. v. Georgia Fruit &c. Exch., 91 Ga. 389, 17 S. E. 904.

[56] The Delaware, 14 Wall. (U. S.) 579, 20 L. ed. 779; Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; Shackleford v. Wilcox, 9 La. 33; Sproat v. Donnell, 26 Maine 185, 45 Am. Dec. 103; Lenox v. United Ins. Co., 3 Johns. Cas. (N. Y.) 178; Creery v. Holly, 14 Wend. (N. Y.) 26; Blackett v. Royal Exchange Co., 2 Cromp. & J. 244; The Waldo, Davies 161.

[57] Toledo &c. R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Steidl v. Minneapolis &c. R. Co., 94 Minn. 233, 102 N. W. 701.

[58] Long v. New York &c. R. Co.,

§ 2144 (1424). **Construction of bills of lading.**—As with other contracts, the meaning of the parties is to be gathered from the bill as a whole;[59] and, there being both a bill of lading and a shipping note, executed and delivered simultaneously and relating to the same matter, they constitute one agreement.[60] In case of doubt a bill of lading should generally be construed strictly, but reasonably, against the carrier.[61] Written portions prevail over contradictory printed portions.[62] And a memorandum writ-

50 N. Y. 76; Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341; Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 599; Richmond &c. R. Co. v. Shomo, 90 Ga. 496. See also Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991.

[59] Ashmore v. Pa. S. T. Co., 28 N. J. L. 180; Missouri &c. Ry. Co. v. Walston (Okla.), 128 Pac. 909, 911 (citing text); Lawrence v. McGregor, Wright (Ohio) 193; Heineman v. Grand T. R. Co., 31 How. Pr. (N. Y.) 430. See also Whitnack v. Chicago &c. R. Co., 82 Nebr. 464, 118 N. W. 67, 19 L. R. A. (N. S.) 1011n, 130 Am. St. 692; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358. But a specific clause will usually prevail over a general one. Texas & P. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. ed. 362. The shipper is not bound by a clause on the back of the shipping bill, which, apparently by inadvertence, was not struck out, or adapted to the terms of the special contract. Jennings v. Grand Trunk R. Co., 52 Hun 227, 23 N. Y. St. 15, 5 N. Y. S. 140. The caption is part of the bill. Robinson v. Merchants' D. T. Co., 45 Iowa 470; Stewart v. Merchants' D. T. Co., 47 Iowa 229, 29 Am. Rep. 476; United States v. Kimbal, 13 Wall. (U. S.) 636, 20 L. ed. 503.

[60] Jennings v. Grand Trunk R. Co., 52 Hun 227, 23 N. Y. St. 15, 5 N. Y. S. 140. See also Richmond &c. R. Co. v. Shomo, 90 Ga. 496, 16 S. E. 220.

[61] The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. ed. 419; Texas &c. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 255, 46 L. ed. 358; Miller v. Hannibal &c. R. Co., 24 Hun (N. Y.) 607; Babcock v. Lake &c. R. Co., 49 N. Y. 491; Missouri &c. Ry. Co. v. Walston (Okla.), 128 Pac. 909, 911 (citing text); Elkins v. Empire T. Co., 2 Week. No. Cas. (Pa.) 403; Lebeau v. Gen. S. N. Co., 42 L. J. C. P. 1, 8 L. R. C. P. 88. See also Louisville &c. R. Co. v. Southern Flour &c. Co., 136 Ga. 538, 71 S. E. 884; Lehigh Val. Transp. Co. v. Post Sugar Co., 128 Ill. App. 600, affirmed in 228 Ill. 121, 81 N. E. 819; Mark, Owen &c. Co. v. Michigan Cent. R. Co. (Ill.), 125 N. E. 767, certiorari granted in 40 Sup. Ct. 483. But compare Nashville &c. R. Co. v. Grayson &c. Nat. Bank, 100 Tex. 17, 93 S. W. 431.

[62] Alabama &c. R. Co. v. Thom-

ten on the margin of the bill of lading may be as valid as if written in the body of the bill.[63] Other general rules governing the interpretation or construction of bills of lading will be found in another section;[64] but it may be well to call attention in this immediate connection to a few cases involving the construction of particular provisions. A provision requiring the shipper to give notice of any claim for loss or injury to animals was held not to require notice of a claim for injury to household goods, and in the same case it was also held that a bill of lading having on it the characters, "Rel. Val. Lts. 5 cwt," in the absence of evidence on the subject, would be construed as an agreement limiting the value of the property to five dollars per hundred pounds.[65] And under the Missouri statute making the carrier liable, where it issues a bill of lading for a through shipment, for any loss caused by its negligence or that of any connecting carrier it is held that it is liable for the negligence of a connecting carrier where the contract is for the shipment to a point beyond the line of the initial carrier at a through rate, even though it is provided in the bill of lading that it only undertakes to deliver to the connecting carrier and shall not be liable for the negligence of the latter.[66]

§ 2145 (1425). Construction of particular words and phrases. —It is held that such abbreviations as "C. O. D." and "F. O. B." have by long usage acquired a fixed and well-known meaning, and that courts and juries understand without further explana-

as, 89 Ala. 294, 18 Am. St. 119; Stanard Milling Co. v. White Line &c. Co., 122 Mo. 258, 26 S. W. 704, 61 Am. & Eng. R. Cas. 185.

[63] Brown v. Adams, 3 Tex. App. (Civil Cases), 462. But see Pamkinsky v. Illinois Cent. R. Co., 165 Ill. App. 556.

[64] Post, § 2145. As to the conflict of laws, see post, §§ 2243, 2264.

[65] Norfolk &c. R. Co. v. Harmán, 104 Va. 501, 52 S. E. 368. To the same effect is Missouri &c. Ry. Co. v. Walston (Okla.), 128 Pac. 909.

[66] Farmers' Bank v. St. Louis &c. R. Co., 119 Mo. App. 1, 95 S. W. 286. See also Ingwersen v. St. Louis R. Co., 116 Mo. App. 139, 92 S. W. 357; McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, affirmed in Missouri, K. & T. R. v. McCann, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. ed. 1093.

t'on the meaning of such terms,[67] but it is said by other courts that their meaning can not be considered as judicially settled so that judicial notice can be taken of the purpose for which they are used, and that parol evidence may be used to explain them and thus to remove all ambiquity by showing their meaning in the contract in which they are employed.[68] Their technical or customary meaning being thus established, and all ambiguity being removed, it has been held that parol evidence is no further admissible to vary or explain them, and, of course, if the words or terms are used in the ordinary and usual sense as commonly used by everybody, no parol evidence is necessary. Where "C. O. D." is used, it is held that the contract of the carrier, in connection therewith, is not only for the safe carriage and delivery of the goods to the consignee, but it further contracts with the consignor that it will "collect on delivery" and return to him the charges on such goods.[69] The letters "F. O. B." mean "free on board," and their effect has been determined in a number of cases.[70] The phrase "at owner's risk," as used in bills of lading,

[67] United States Express Co. v. Keefer, 59 Ind. 263; American &c. Express Co. v. Schier, 55 Ill. 140; State v. Intoxicating Liquors, 73 Maine 278; Vogt v. Schienbeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 759, 106 Am. St. 989 (citing text); Sheffield &c. Co. v. Hull &c. Co., 101 Ala. 446, 14 So. 672. See also Capehart v. Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. 60; Kilmer v. Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271. And see as to meaning of "c. i. f." Thomas &c. Ins. Co. v. Hughes, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. 496; Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94.

[68] Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Silberman v. Clark, 96 N. Y. 522.

[69] United States Express Co. v. Keefer, 59 Ind. 263; American &c. Express Co. v. Schier, 55 Ill. 140. See also Cleveland &c. R. Co. v. Anderson &c. Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749. It has been held that if the consignee neglects or refuses to take and pay for the goods they remain in the carrier's hands subject only to his liability as a warehouseman. Gibson v. American &c. Ex. Co., 1 Hun (N. Y.) 387. See also Pacific Exp. Co. v. Wallace, 60 Ark. 100, 29 S. W. 32, 61 Am. & Eng. R. Cas. 170; Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803; Weed v. Barney, 45 N. Y. 344.

[70] Kilmer v. Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271; Vogt v. Schienbeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. 989; Capehart v. Furman &c. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. 60; Knapp Elec. Works

is construed to only exempt the carrier from liability as insurer, and not to exempt him from liability for negligence,[71] and the insertion of the words "at the convenience of the company" will not protect the company in case of unreasonable delay.[72] It is held that the words "privilege of reshipping" in a bill of lading are intended for the benefit of the carrier, but it is bound for safe delivery to the same extent as if such words did not appear,[73] and it has also been held that the general liability of the carrier is not restricted by an exception on account of "unavoidable dangers and accidents of the road."[74]

§ 2146 (1426). As muniments of title—Delivery by carrier.—A bill of lading is regarded as a symbol of the property therein

v. New York &c. Co., 157 Ill. 456, 42 N. E. 147. See also Evanston Elevator &c. Co. v. Castner, 133 Fed. 409; Baltimore &c. R. Co. v. Steel Rail Supply Co., 123 Fed. 655; Hurst v. Altamont Mfg. Co., 73 Kans. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928n, 117 Am. St. 525, 9 Ann. Cas. 549; Samuel M. Lawder & Sons v. Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795 and note; A. J. Niemeyer Lumber Co. v. Burlington &c. R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534; Miller v. Seaman, 176 Pa. St. 291, 35 Atl. 134; Manganese &c. Safe Co. v. First State Bank, 25 S. Dak. 119, 125 N. W. 572; Rosevear China Clay Co., Ex parte, L. R. 11 Ch. Div. 565, 40 L. T. N. S. 730.

[71] Mobile &c. R. Co. v. Jarboe, 41 Ala. 644; Fitzgerald v. Grand Trunk R. Co., 4 Ont. App. 601; Baltimore &c. R. Co. v. Rathbone, 1 W. Va. 87; Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271. See post, § 2262; also McGovern v. Ann Arbor R. Co., 165 Wis. 525, 162 N. W. 668, 669, citing text.

[72] Branch v. Wilmington &c. R. Co., 88 N. Car. 573, 18 Am. & Eng. R. Cas. 621; Whitehead v. Wilmington &c. R. Co., 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168.

[73] Broadwell v. Butler, 6 McLean (U. S.) 296. And evidence of usage was held admissible. See also Little v. Semple, 8 Mo. 99, 40 Am. Dec. 123; Carr v. Steamboat Michigan, 27 Mo. 196, 72 Am. Dec. 257; McGregor v. Kilgore, 6 Ohio 358, 27 Am. Dec. 260.

[74] Walpole v. Bridges, 5 Blackf. (Ind.) 222. See also Fowler v. Davenport, 21 Tex. 626, and Harmony v. Bingham, 1 Duer (N. Y.) 209. But it seems to us that this decision is erroneous. As to the meaning of the phrase "awaiting delivery" or "awaiting further conveyance," see Texas & P. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358, distinguishing McKinney v. Jewett, 90 N. Y. 267, and Michigan Cent. R. Co. v. Mineral Springs &c. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297.

described, and stands in the place of the goods it represents.[75] If it is issued to the true owner[76] of goods, it secures his title thereto during the period of transportation while the ownership and possession are severed.[77] The carrier must usually bear the risk of delivering the goods to the person entitled to them under the bill and its indorsements.[78] If there be no reservation by the

[75] Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991; American Nat. Bank v. Henderson, 123 Ala. 612, 26 So. 498, 82 Am. St. 147; Dodge v. Meyer, 61 Cal. 405; Evansville &c. R. Co. v. Erwin, 84 Ind. 457, 9 Am. & Eng. R. Cas. 252; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321 and note; Ryan v. Great Northern Ry. Co., 90 Minn. 12, 95 N. W. 758; Robert C. White &c. Co. v. Chicago &c. R. Co., 87 Mo. App. 330; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861; note to Chandler v. Sprague, 38 Am. Dec. 419.

[76] The Idaho, 93 U. S. 575, 23 L. ed. 978; Moore v. Robinson, 62 Ala. 537; Richardson v. Smith, 33 Ga. (Lester's Sup.) 95; Union &c. T. Co. v. Yeager, 34 Ind. 1; Blossom v. Champion, 37 Barb. (N. Y.) 554; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 44; Dows v. Perrin, 16 N. Y. 325; Mechanics' &c. Bank v. Farmers' &c. Bank, 60 N. Y. 40; Craven v. Ryder, 6 Taunt. 433. If the carrier is compelled by legal action to deliver the goods to the true owner, he can not be held for failing to deliver in accordance with the bill. Bliven v. Hudson R. Co., 36 N. Y. 403; Stollenwerck v. Thacher, 115 Mass. 224; Bates v. Stanton, 1 Duer (N. Y.) 79; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Hardman v. Wilcock, 9 Bing. 382; Biddle v. Bond, 6 Best & S. 225; Cheesman v. Exall, 6 Exch. 341, But see Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541 and note; Pickering v. Busk, 15 East 38.

[77] Judson v. Minneapolis &c. R. Co., 131 Minn. 5, 154 N. W. 506, 507 (quoting text).

[78] Merchants' D. &c. Co. v. Merriam, 111 Ind. 5, 11 N. E. 954; Ratzer v. Railway Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530; Judson v. Minneapolis &c. R. Co., 131 Minn. 5, 154 N. W. 506, 507 (citing text); Hawkins v. Hoffman, 6 Hill (N. Y.) 586; Guillaume v. Hamburg &c. Packet Co., 42 N. Y. 212, 1 Am. Rep. 512; McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Bailey v. Hudson River Railroad, 49 N. Y. 70; General Elec. Co. v. Southern R., 72 S. Car. 251, 51 S. E. 695, 110 Am. St. 600; Devereux v. Barclay, 2 B. & Ald. 702; Duff v. Budd, 3 B. & Bing. 177. The carrier must recognize all transfers of the bill by indorsement. Walker v. Detroit &c. R. Co., 49 Mich. 446, 13 N. W. 812, 9 Am. & Eng. R. Cas. 251; Colgate v. Pennsylvania Co.,

shipper, the title presumptively rests in the consignee,[79] but, under some circumstances, only after his receipt of the bill of lading.[80] A delivery to him, upon presentation of the bill,[81] will

102 N. Y. 120, 6 N. E. 114. Evidence, however, of previous deliveries to one who was neither the consignee nor entitled to the delivery by the terms of the bill of lading, or by its assignment, with the knowledge of the owner of the goods and without any objection having been made by him, has been held to justify such a delivery. Ontario Bank v. New Jersey Steamboat Co., 59 N. Y. 510. The carrier does not warrant the title of the shipper. National Bank v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263n, 20 Am. St. 566.

[79] Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58; Watkins v. Paine, 57 Ga. 50; Merchants' &c. Co. v. Smith, 76 Ill. 542; Sedgwick v. Cottingham, 54 Iowa 512, 6 N. W. 738; Sonia Cotton Oil Co. v. Steamer Red River, 106 La. Ann. 42, 30 So. 303, 87 Am. St. 294; Toney v. Corliss, 33 Maine 333; McCauley v. Davidson, 13 Minn. 162; Arnold v. Prout, 51 N. H. 587; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Griffith v. Ingledew, 6 S. & R. (Pa.) 429, 9 Am. Dec. 444; Schlesinger v. Stratton, 9 R. I. 578; Congar v. Galena R. Co., 17 Wis. 477. The presumption may be rebutted. Dawes v. Peck, 8 T. R. 330; Merchants' Exch. Bank v. McGraw, 76 Fed. 930; Stanton v. Eager, 16 Pick. (Mass.) 467; Covell v. Hitchcock, 23 Wend. (N. Y.) 611; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Waldron v. Romaine, 22 N. Y. 368; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Anderson v. Clark, 2 Bing. 20; Walley v. Montgomery, 3 East 585; Haille v. Smith, 1 B. & P. 563; Dutton v. Solomonson, 3 B. & P. 582. See also Bank v. Elliott, 83 Minn. 469, 86 N. W. 454; Sandford v. Seaboard &c. Ry. Co., 79 S. Car. 519, 61 S. E. 74.

[80] Conard v. Atlantic I. Co., 1 Peters (U. S.) 386, 7 L. ed. 189; Taylor v. Turner, 87 Ill. 296; Hausman v. Nye, 62 Ind. 485, 30 Am. Rep. 199; Pratt v. Parkman, 24 Pick. (Mass.) 42; First Nat. Bank v. Crocker, 111 Mass. 163; Bruce v. Andrews, 36 Mo. 593; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Mitchell v. Ede, 11 Ad. & Ellis 888. See also Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758 (carrier may require him to produce it). In Judson v. Minneapolis &c. R. Co., 131 Minn. 5, 154 N. W. 506, it is held that under the forms recommended by the Interstate Commerce Commission a "straight" bill is nonnegotiable and is to be so stamped on its face, and an order bill requires the surrender of the bill indorsed as required before delivery of the property to the consignee or the carrier may be liable to the shipper for conversion.

[81] The carrier must ascertain, it has been held, whether a bill was issued, and, if so, deliver only in accordance therewith. City Bank v. Rome &c. R. Co., 44 N. Y. 136;

discharge the carrier, he having had no notice of the failure of the presumption.[82] If the carrier delivers the goods to the person lawfully entitled to them, this is ordinarily sufficient even without demanding the presentation of the bill of lading.[83] A bill directing delivery to the vendor's order is prima facie evidence that he does not intend that the title shall pass to the vendee, and notice to the carrier that he must not deliver to the consignee without the bill properly indorsed by the consignor.[84] A pledgee

Furman v. Union Pacific &c. R. Co., 106 N. Y. 579, 13 N. E. 587. See also Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. 294. A custom at the residence of both the consignee and the holder of a draft with bill attached, of delivery without the bill, will justify the carrier in so delivering. Forbes v. Boston &c. R. Co., 133 Mass. 154. But such local custom will not prevail against a consignor without knowledge of it. Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650 and note, 9 Am. St. 504, nor against a statute requiring delivery only on presentation of bill. Colgate v. Pennsylvania Co., 102 N. Y. 120. 6 N. E. 114.

[82] O'Dougherty v. Boston &c. R., 1 Thomp. & C. 477; Sweet v. Barney, 23 N. Y. 335; Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58. The carrier has the right, under such circumstances, to settle with the consignee a claim for damages for non-delivery. Scammon v. Wells, Fargo & Co., 84 Cal. 311, 24 Pac. 284.

[83] Chicago Packing &c. Co. v. Savannah &c. R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367 (demanding the bill of lading is merely precautionary on the part of the carrier); Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Gates v. Chicago &c. R. Co., 42 Nebr. 379, 60 N. W. 583; National Commercial Bank of Albany v. Lackawana Transp. Co., 59 App. Div. 270, 69 N. Y. S. 396, affirmed in 172 N. Y. 596, 64 N. E. 1123. But if it is otherwise provided in the bill of lading the carrier may be liable to an innocent person injured by such surrender of the goods without the bill. Merchants &c. Bank v. Steamboat Co., 102 Md. 573. 63 Atl. 108; Midland Nat. Bank v. Missouri &c. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505. But see as between the carrier and shipper, Famous Mfg. Co. v. Chicago &c. Ry. Co., 166 Iowa 361, 147 N. W. 754. And in some states this seems to be the rule even in the absence of any such express provision in the bill. St. Louis &c. R. Co. v. Little Rock, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; 4 Elliott Cont. § 3164.

[84] North Penn. R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; Bass v. Glover, 63 Ga. 745; Boatmen's &c. Bank v. Western &c. R. Co., 81 Ga. 221, 7 S. E. 125; Georgia &c. Ry. Co. v. Blish Milling Co.,

to whom a bill has been delivered has, in general, the same rights as a purchaser for value, and may maintain an action of replevin for the possession.[85]

15 Ga. App. 142, 82 S. E. 784; Halsey v. Warden, 25 Kans. 128; Alderman v. Eastern R. Co., 115 Mass. 233; Libby v. Ingalls, 124 Mass. 503; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. 151; Watson v. Hoosac Tunnel Line, 13 Mo. App. 263; First Nat. Bank v. Northern Railroad Co., 58 N. H. 203; Commercial Bank v. Pfeiffer, 22 Hun (N. Y.) 327; Furman v. Union Pac. &c. R. Co., 106 N. Y. 579, 13 N. E. 587; Holmes v. Bailey, 92 Pa. St. 57; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 156, 4 Am. St. 626; Joslyn v. Grand T. R. Co., 51 Vt. 92; Ellershaw v. Magniac, 6 Ex. 569; Ogg v. Shuter, L. R. 1 C. P. Div. 47; Jenkyns v. Brown, 14 Q. B. 496; Mason v. Great W. R. Co., 31 U. C. Q. B. 73. See also General Elec. Co. v. Southern R., 72 S. Car. 251, 51 S. E. 695; National Bank v. Atlanta &c. R. Co., 25 S. Car. 216. But compare Witt v. East Tenn. &c. R. Co., 99 Tenn. 442, 41 S. W. 1064. So with a bill directing delivery to the order of the vendor's agent. The St. Joze Indiano, 1 Wheat. (U. S.) 208, 4 L. ed. 73; Dows v. Nat. Ex. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214. There is the same presumption where the vendor assigns the bill to one who discounts a draft. The title only passes with the acceptance or payment of the draft. Dows v. Nat. Ex. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214; Alderman v. Eastern R. Co., 115 Mass. 233; Stollenwerck v. Thacher, 115 Mass. 224; Jenkyns v. Brown, 14 Q. B. 496; People's &c. Bank v. Stewart, 3 P. & B. (19 New Bruns.) 268. "It is no excuse," says the court in The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804, "for a delivery to the wrong person that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee at least was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown or is absent or can not be found after diligent search. And if, after inquiry, the consignee or indorsees of a bill of lading for delivery to order can not be found, the duty of the carrier is to retain the goods until they are claimed, or store them prudently for and on account of the owner. He may thus relieve himself from a carrier's responsibility. He has no right, under any circumstances, to deliver to a stranger." An invoice furnishes no proof of title, and the carrier is not justified in relying on it in making delivery. Pennsylvania Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626. As to factors receiving bills, see Rice v. Austin, 17 Mass. 197; Valle v. Carre, 36 Mo. 575; Davis v. Bradley, 24 Vt. 55; Wade v. Hamilton, 30 Ga. 450.

[85] Dows v. National Ex. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214; First National Bank v. Dear-

§ 2147 (1427). Effect of direction in bill of lading to "notify" some designated person.—A direction in a bill of lading to consignor's order to "notify" some one else, does not warrant the carrier in deliving the property to the person so to be notified without the production of the bill of lading.[86] The use of the term "notify" shows that the party to be notified was not intended as the consignee, but was simply to be advised of the arrival of the goods.[87] The fact that a bill of lading is made out to the consignor's order makes this still plainer. Indeed, it has been held that such a contract is so plain and unambiguous that a custom in a certain city to deliver property under similar bills of lading to the person to be notified cannot be shown.[88]

born, 115 Mass. 219, 15 Am. Rep. 92; Fifth Nat. Bank v. Bayley, 115 Mass. 228; Marine Bank v. Wright, 48 N. Y. 1; Farmers' &c. & M. Bank v. Logan, 74 N. Y. 568; Tilden v. Minor, 45 Vt. 196.

[86] North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727. 8 Sup. Ct. 266, 31 L. ed. 287; Libby v. Ingalls, 124 Mass. 503; North v. Merchants' &c. Co., 146 Mass. 315, 15 N. E. 779; Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; National Bank v. Atlanta &c. Co., 25 S. Car. 216; Joslyn v. Grand T. R. Co., 51 Vt. 92; General Elec. Co. v. Southern R., 72 S. Car. 251, 51 S. E. 695, 110 Am. St. 600. And the bill must usually be indorsed, in such a case, by the consignor.

[87] Union Stock Yards Co. v. Westcott, 47 Nebr. 300, 66 N. W. 419, 422; Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; Atlantic Nat. Bank v. Railway Co., 106 Fed. 623. See also Raleigh &c. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867; St. Louis &c. R. Co. v. Allen (Okla.), 120 Pac. 1090, 39 L. R. A. (N. S.) 309, 311 (quoting text). It has been said that if he were the consignee such direction would be unnecessary. for it is the duty of a carrier to notify the consignee upon the arrival of the goods anyway. North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287.

[88] Bank of Commerce v. Bissell, 72 N. Y. 615. See also Western &c. R. Co. v. Ohio Valley Banking &c. Co., 107 Ga. 512, 33 S. E. 821. This whole section is quoted in Lusk v. Lawton Grain Co. (Okla.), 174 Pac. 793, 795. It is common practice to forward such bills of lading with a draft on the purchaser which he is to pay before obtaining the goods. As to the effect of this, see Heiskell v. Farmers' &c. Bank, 89 Pa. St. 155, 33 Am. Rep. 745; National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. ed. 208; Dows v. National Ex. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214; Marine Bank v. Wright, 48 N. Y. 1; Commercial Nat. Bank v. Chicago &c. R. Co.,

§ 2148 (1428). Bills of lading assignable, but not negotiable. —As already stated, bills of lading are not negotiable at common law as commercial paper,[89] and any defense available against an action by the shipper is generally available against one by an innocent holder for value.[90] They are, however, assignable, and in a larger than usual sense inasmuch as their assignment ordinarily

160 Ill. 401, 43 N. E. 756; and authorities cited in preceding notes to this section; and McNeeley & Co. v. Lake Shore &c. Ry. Co., 64 Ind. App. 363, 115 N. E. 954, 955 (quoting this section); also post, § 2150.

[89] Friedlander v. Texas & P. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991, 40 Am. & Eng. R. Cas. 70; J. C. Haas & Co. v. Citizens' Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242n, 113 Am. St. 61; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321, and note; Stollenwerck v. Thacher, 115 Mass. 224; Am. notes to Lickbarrow v. Mason, 2 T. R. 63. As to effect of marking a bill "non-negotiable," see Maryland case above cited in this note, also Midland Nat. Bank v. Missouri &c. Co., 62 Mo. App. 531; Colgate v. Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114. Many statutes have been enacted for the purpose of making bills of lading negotiable, but they are generally held not to make them negotiable in the fullest sense, as commercial paper. For the construction of respectively the Pennsylvania and the Maryland and Missouri statutes, see Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; Tiedeman v. Knox, 53 Md. 612; First Nat. Bank v. Mt. Pleasant &c. Co., 103 Iowa 518, 72 N. W. 689. See however as to Maryland statute as amended, Layard v. Merchants' &c. Transp. Co., 78 Md. 1, 26 Atl. 897. And as to Louisiana statute, Hardie & Co. v. Vicksburgh &c. R. Co., 118 La. 253, 42 So. 793. For construction of Minnesota statute, see National Bank v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. 566. In Knight v. St. Louis &c. R. Co., 141 Ill. 110, 30 N. E. 543, it was held that an assignee of a bill of lading can not sue the carrier in his own name for failure to transport and deliver the goods according to the contract, since bills of lading are non-negotiable. It may be well to repeat here that statutes and the U. S. Bill of Lading Act, where it applies, have made some changes in the common law rules stated in this and other sections of this chapter. See post § 2153.

[90] Hazard v. Illinois &c. R. Co., 67 Miss. 32, 7 So. 280, 42 Am. & Eng. R. Cas. 455. See also Hunt v. Mississippi &c. R. Co., 29 La. Ann. 446; Alabama Nat. Bank v. Mobile &c. R. Co., 42 Mo. App. 284; Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42; Anchor Mills Co. v. Railroad Co., 102 Iowa 262, 71 N. W. 255. In Boatman's Savings

constitutes a complete legal delivery of the goods.[91] But, as a rule at least, a fraudulent assignment is no excuse for the delivery of the goods to any one, even a bona fide purchaser for a valuable consideration, other than the true owner.[92] The consignor's

Bank v. Western &c. R. Co., 81 Ga. 221, 7 S. E. 125, the plaintiff to whom a bill of lading and draft had been indorsed for value, presented the draft for acceptance. The acceptance was refused on the ground that the goods had been sold on sixty days' time, the drawees promising to accept such draft. The bank having possession of the bill, the railroad company delivered the goods to the purchasers, who were drawees of the draft, after which such purchasers executed their note for the price of the goods, as of the date of the bill and draft, payable in sixty days. The note was discounted by the bank for value, without notice that it was for the goods described in the bill of lading, or that the goods had been delivered to the makers. It was held that the bank could recover on the bill of lading, although the makers paid the note, the latter not being for the exact amount of the draft.

[91] Dodge v. Meyer, 61 Cal. 405; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Michigan C. R. Co. v. Phillips, 60 Ill. 190; Stone v. Wabash &c. R. Co., 9 Ill. App. 48; McKee v. Garcelon, 60 Maine 165. 11 Am. Rep. 200; Robinson v. Stuart, 68 Maine 61; Stone v. Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Forbes v. Boston &c. R. Co., 133 Mass. 154; Hazard v. Fiske, 83 N. Y. 287; National Bank v. Atlanta &c. R., 25 S. Car. 216; Campbell v. Alford, 57 Tex. 159; Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226; Tilden v. Minor, 45 Vt. 196; Joslyn v. Grand T. R. Co., 51 Vt. 92; Meyerstein v. Barber, L. R. 2 C. P. 38; Benjamin Sales (7th Am. ed.), § 813. See also Hatfield v. Phillips, 9 M. & W. 647; Sewell v. Burdick, 52 L. T. R. 445, and cases therein reviewed. The rights of an assignee for value are equal to, but not greater than, those of the assignor. Haas v. Kansas City &c. R., 81 Ga. 792, 7 S. E. 629; Tison v. Howard, 57 Ga. 410; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892. See also Haas &c. Co. v. Citizens' Bank, 144 Ala. 562, 39 So. 129, 113 Am. St. 61; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276; Quality Shingle Co. v. Old Oregon &c. Co. (Wash.), 187 Pac. 705 (under U. S. Bill of Lading Act). But compare Missouri Pac. R. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944. And the assignee's title is superior to the lien claim of a person to whom the carrier delivered the property, for charges against the transfer on prior consignments. Dickson v. Merchants' Elevator Co., 44 Mo. App. 498. And see Neill v. Rogers &c. Produce Co., 41 W. Va. 37, 23 S. E. 702. Compare, however, Bishop v. Empire Transp. Co., 48 How. Pr. (N. Y.) 119.

[92] Gurney v. Behrend, 3 El. & Bl. 622; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; Brower v. Peabody, 13 N. Y. 121; Decan v.

rights under the bill may be transferred by its delivery and indorsement,[93] and in most jurisdictions a delivery without indorsement will convey the title if the intention is clear.[94] It has also been held that the indorsement may be made conditional or restrictive, as well as unconditional or in blank, and where it is so made the indorsee takes it subject to the conditions or restrictions.[95]

§ 2149 (1429). Rights of bona fide purchasers and other third persons who hold bills of lading.—As we have seen, the weight of authority is to the effect that where no goods are actually received by the carrier it is not liable at common law upon a bill of lading even to a bona fide purchaser. But a question as to the rights of bona fide purchasers frequently arises in other cases

Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Dows v. Perrin, 16 N. Y. 325. Compare Dows v. Greene, 24 N. Y. 638. See post, §§ 2291, 2312.

[93] The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804, and authorities cited in following notes.

[94] Glidden v. Lucas, 7 Cal. 26; Dodge v. Meyer, 61 Cal. 405; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Jeffersonville &c. R. Co. v. Irvin, 46 Ind. 180; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Allen v. Williams, 12 Pick. (Mass.) 297; First Nat. Bank v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Davenport Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Scharff v. Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. 672; American Zinc &c. Co. v. Markle Lead Works, 102 Mo. App. 158, 76 S. W. 668; Gibson v. Stevens, 8 How. (N. Y.) 384, 400; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Merchants' Bank v. Union R. Co., 69 N. Y. 373; Holmes v. Germ. Sec. Bank, 87 Pa. St. 525; Campbell v. Alford, 57 Tex. 159; Fowler v. Meikleham, 7 Low. Can. 367; Nathans v. Giles, 5 Taunt. 558. See also Florence &c. R. Co. v. Jensen, 48 Colo. 28, 108 Pac. 974; Ladd &c. Bank v. Commercial State Bank, 64 Ore. 486, 130 Pac. 975, 49 L. R. A. (N. S.) 657n; In re Levin, 173 Fed. 119. That the consignor may show an intention to the contrary, see Alabama &c. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 So. 356. See also Louisville &c. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Walker v. First Nat. Bank, 43 Ore. 102, 72 Pac. 635. See as to statute requiring indorsement, Bonds-Foster Lumber Co. v. Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877. And compare Arkansas &c. R. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160; Scharff v. Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. 672.

[95] Barrow v. Coles, 3 Camp. 92; Walley v. Montgomery, 3 East 585.

where the goods have been delivered to the carrier. It has been held that a purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a bona fide purchaser, and is not entitled to hold the goods covered by the bill against their true owner.[96] But a pledgee who holds the bill as collateral security for money loaned or advanced thereon has, in general, the same rights, so far as the exercise of them is necessary for his protection, as a purchaser for value, and, in the absence of anything to the contrary, is to that extent, at least, a bona fide purchaser.[97] So, it has been held that one who clothes another with

[96] Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892. See Alderman v. Eastern R. Co., 115 Mass. 233; Mason v. Great Western R. Co., 31 U. C. Q. B. 73; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321. This is true where a bill of lading, because of the negligence of the owner or his agent, is found or stolen by the transferrer and transferred by him to an innocent third party. Gurney v. Behrend, 3 El. & B. 622; Dows v. Perrin, 16 N. Y. 325; Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Moore v. Robinson, 62 Ala. 537; Raleigh &c. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867. See also Lehman v. Central R. &c. Co., 12 Fed. 595; The Carlos F. Roses, 177 U. S. 655, 20 Sup. Ct. 303, 44 L. ed. 929. But if the bill of lading has been actually transferred by the real owner, although the assignment and transfer has been procured from the owner of the goods by fraud, the bona fide holder by purchase from the fraudulent vendee will acquire a good title to the goods. Dows v. Greene, 24 N. Y. 638; Moore v. Robinson, 62 Ala. 537; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Pease v. Gloahec, L. R. 1 Privy C. App. 219. See also as to a purchaser of a false bill of lading being put on inquiry, Jasper Trust Co. v. Kansas City &c. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. 75; Decan v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334. And see as to effect of time of transfer on liability of carrier, Adams v. Steamer Trent, 19 La. Ann. 262; National &c. Bank v. Lackawanna Transp. Co., 59 App. Div. 270, 69 N. Y. S. 396; but compare Colgate v. Pennsylvania Co., 31 Hun (N. Y.) 297; Kirkpatrick v. Kansas City &c. Co., 86 Mo. 341.

[97] Dows v. National Ex. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214; Marine Bank v. Wright, 48 N. Y. 1; Tilden v. Minor, 45 Vt. 196; Dymock v. Missouri R. Co., 54 Mo. App. 400; Fifth Nat. Bank v. Bayley, 115 Mass. 228. See also Paxson Bros. v. Warfield, 6 Ga. App. 315, 65 S. E. 34; Mason v.

indicia of ownership, thereby putting it in his power to deal with a thing as his own, is estopped from asserting a better title as against a bona fide purchaser for value who has no knowledge of such title.[98] Where a firm was engaged in mercantile business at one station on a railroad, and had a mill at another, and a member of such firm was the railroad agent at the latter place, but the business at both places was practically conducted at the former, it was held that the railroad company, having knowledge of the manner of conducting business, was liable to innocent holders of bills of lading taken as collateral by them, without knowledge of any irregularity, after delivery to the firm at the latter station of goods which had been shipped by them from the former station, the goods being delivered without presentation of the bills of lading.[99] But, in another case, where the railroad company

Nelson Cotton Co., 148 N. Car. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221n, 128 Am. St. 635; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290 and note; First Nat. Bank v. Crocker, 111 Mass. 163. As to the effect of such a pledge on the vendor's right of stoppage in transitu, see Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861, and compare Dymock v. Missouri &c. R. Co., 54 Mo. App. 400. See also National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321 and note, and post, § 2318, et seq. As to rights against the carrier see Citizens &c. Bank v. Southern R. Co., 153 N. Car. 346, 69 S. E. 261.

[98] Dymock v. Missouri &c. R. Co., 54 Mo. App. 400. See also Wichita Sav. Bank v. Atchison &c. R. Co., 20 Kans. 519 (a case to some extent contrary to the weight of authority); Pollard v. Reardon, 65 Fed. 848; Western Union R. Co. v. Wagner, 65 Ill. 197; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321n; Farmers' &c. Bank v. Erie R. Co., 72 N. Y. 188; Carr v. London &c. R. Co., 10 C. P. 307; Coventry v. Great Eastern Ry. Co., 11 Q. B. D. 776. In several of these cases the doctrine was applied in favor of a bona fide purchaser and against the carrier. But it has been held to have no application where the instrument is forged, and the company is not in fault. Chesapeake &c. Co. v. Merchants' Nat. Bank, 102 Md. 589, 63 Atl. 113; Lehman v. Central &c. R., 12 Fed. 596.

[99] Walters v. Western &c. R. Co., 56 Fed. 369. See also Ratzer v. Burlington &c. R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530; National Bkg. Co. v. Delaware &c. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. 825. But see Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991; Missouri Pac. R. Co. v. McFadden,

was not in fault, it was held that it was not liable to a bank which had taken bills of lading for grain as security for a loan to the indorsee, and had then permitted him to obtain possession of them, whereby he secured the grain from the company.[1] One who takes a bill of lading merely as security for, or in consideration of an antecedent indebtedness, is not a bona fide purchaser for value.[2] But the surrender by a pledge of a bill of lading securing a loan has been held to be a sufficient consideration for the substitution, as security, of a bill of lading antedating the loan.[3] The assignee has no right to require delivery of the goods where the freight is due and unpaid,[4] and it has been held that a provision in a bill of lading giving the carrier a lien on the goods mentioned therein and shipped thereunder, for arrearage of freight on other goods previously shipped, is binding on one who takes the bill as security for advances of money to the ship-

154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944. In the last case just cited it was held that a railroad company was not liable to an assignee without notice on bills of lading for cotton which, according to agreement and the course of dealing between the carrier and the shipper, had been left in the possession of a compress company as agent for the shipper and before delivery to the carrier was destroyed by fire. See also The Carlos F. Roses, 177 U. S. 655, 20 Sup. Ct. 803, 44 L. ed. 929.

[1] Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276, citing Newsom v. Thornton, 6 East 17; Hatfield v. Phillips, 9 M. & W. 647; Meyerstein v. Barber, L. R. 2 C. P. 38. See also Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454.

[2] Dymock v. Missouri &c. R. Co., 54 Mo. App. 400; Skilling v. Bollman, 73 Mo. 665, 39 Am. Rep. 537; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Harris v. Pratt, 17 N. Y. 249; Naylor v. Dennie, 8 Pick. (Mass.) 198. See also Busenbarke v. Ramey, 53 Ind. 499; Petry v. Ambrosher, 100 Ind. 510. But see contra (under a statute) Tiedeman v. Knox, 53 Md. 612. We do not mean that such a consideration may not support the contract as between the parties, but we refer to cases in which there are prior equities or the rights of innocent third parties are involved in some way.

[3] Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505.

[4] The Schooner Treasurer, 1 Sprague (U. S.) 473, Fed. Cas. No. 14,159. See also Bramley v. Ulster &c. R. Co., 142 App. Div. 176, 126 N. Y. S. 854; Gass v. Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

per, and that the carrier can hold the goods until its lien and claim for freight is discharged.[5]

§2150 (1429a). **Bills with draft attached.**—Bills of lading often have drafts or bills of exchange attached to them by the shipper, especially where the shipper has procured the bill of lading to be made out so as to provide for delivery to his order, and there may be a direction in the bill of lading to notify the purchaser or other person on whom the draft is drawn. Such person, though named as consignee, is not ordinarily entitled to delivery of the property until the draft is paid and the bill of lading properly produced, and the carrier will usually be liable if loss is caused by delivery without the production of the bill of lading and a proper showing in this regard.[6] And it is held that where one wrongfully obtains possession without surrendering the bill of lading, the carrier may retake possession of the property or bring suit therefor at once.[7] Sometimes a draft or bill of exchange, accompanied by the bill of lading, is sent to a bank

[5] Bishop v. Empire Transp. Co., 48 How. Pr. (N. Y.) 119, 33 Super. Ct. (1 J. & S.) 99. Compare also Pacific Aviation Co. v. Wells Fargo & Co., 64 Ore. 530, 128 Pac. 438. But see as to loss of lien, as against third persons without notice, by delivery to consignee who agrees to hold them until charges are paid. Lembeck v. Jarvis Terminal &c. Co., 68 N. J. Eq. 492, 59 Atl. 360.

[6] See post, §§ 2291, 2301, and authorities cited in following notes to this section; also Midland Valley Ry. Co. v. Fay, 89 Ark. 342, 116 S. W. 1171; North Penn. R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; Walters v. Western &c. R. Co., 63 Fed. 391, 66 Fed. 862; Finn v. Western R. Corp., 102 Mass. 283; Libby v. Ingalls, 124 Mass. 503; Newcomb v. Boston &c. R. Co., 115 Mass. 230; Vaughn v. New York &c. R. Co., 27 R. I. 235, 61 Atl. 695. But compare Southern Co. v. Knichen, 103 Ga. 186, 29 S. E. 816; Commercial Bank v. Chicago &c. R. Co., 160 Ill. 401, 43 N. E. 756; Witt v. Railroad Co., 99 Tenn. 442, 41 S. W. 1064 (carrier not liable where drawee paid draft but bank failed before it was remitted to consignor).

[7] Tedford Auto Co. v. Chicago &c. Ry. Co., 116 Ark. 198, 172 S. W. 1006; Rock Island Plow Co. v. Masterson, 96 Ark. 446, 132 S. W. 216; Pennsylvania Co. v. Ry. Co., 144 Ill. 197, 33 N. E. 415; Railway v. Dale, 68 Kans. 108, 74 Pac. 596; Bruill v. Mutual Relief Assn., 72 Wis. 430, 39 N. W. 529.

merely for acceptance or collection,[8] but the cases in which questions of difficulty most often arise are those in which the bill of lading, with draft attached, is taken or sent to a bank by the shipper, and either sold and indorsed to the bank or pledged and indorsed to it to secure advances. The question as to the nature and effect of the transaction usually depends upon the intention of the parties, which, if not otherwise clear, may be determined largely by custom or commercial usage.[9] It has been held that where a time draft is attached to the bill of lading, and discounted by a bank, the very nature of the transaction implies or suggests a sale, or rather an executory contract of sale, to become complete on acceptance of the draft by the drawee, and that after such acceptance, although the bank continues to hold the bill of lading pending payment of the draft, the carrier is justified in delivering the goods to the drawee.[10] But ordinarily, at least where the draft is a sight draft, the transfer gives to the bank a limited, qualified or conditional interest, or special property in the goods, to secure it in the payment of the draft,[11] although

[8] See Cotton Mills v. Weil, 129 N. Car. 452, 40 S. E. 218; St. Paul &c. Co. v. Great Western &c. Co., 27 Fed. 434; Newcomb v. Boston &c. R. Co., 115 Mass. 230; Mechanics' &c. Bank v. Farmers' &c. Bank, 60 N. Y. 40; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. 618.

[9] See Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. 151.

[10] National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. ed. 208; Commercial Bank v. Chicago &c. R. Co., 160 Ill. 401, 43 N. E. 756.

[11] See First Nat. Bank v. Crocker, 111 Mass. 163; American Nat. Bank v. Henderson, 123 Ala. 612, 26 So. 498, 82 Am. St. 147; Tishomingo Sav. Inst. v. Johnson &c. Co., 146 Ala. 691, 40 So. 503; Dodge v. Meyer, 61 Cal. 405; Mather v. Gordon, 77 Conn. 341, 59 Atl. 424; First Nat. Bank v. Dearborn, 115 Mass. 219; Chicago Fifth Nat. Bank v. Bayley, 115 Mass. 228; Davenport Nat. Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Vaughn v. New York &c. R. Co., 27 R. I. 235, 61 Atl. 695; Grayson County Nat. Bank v. Nashville &c. R. Co. (Tex. Civ. App.), 79 S. W. 1094 (citing § 2146, ante). See also Mather v. Gordon, 77 Conn. 341, 59 Atl. 424; American Thresherman v. De Tamble Motors Co., 154 Wis. 366, 141 N. W. 210, 49 L. R. A. (N. S.) 644 and note. The bank was held not liable for freight (the freight bill being marked paid or prepaid, however) in Southern R. Co. v. Simpkins Co., 178 N. Car. 273, 100 S. E. 418.

upon payment by the drawee the title passes to him, and he will be entitled to the goods. So, according to what seems to be the better reason, as well as the weight of authority, such a transaction, not constituting a sale to the bank, does not make it liable to the consignee accepting and paying the draft for failure of title, breach of warranty, or failure of consideration as between the consignor and consignee.[12] Many decisions have been rendered as to the effect of attaching a draft upon the title to the goods, the rights and liabilities of a bank after discounting it, and the rights of assignees and creditors, and the like; but it is not within the scope of this work to treat such matters in detail, and it must suffice to refer here to some of the principal cases and books in which various phases of the subject are fully treated.[13]

[12] Leonhardt &c. Co. v. Small Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887, 119 Am. St. 994; Tolerton &c. Co. v. Anglo-Californian Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777; Hall v. Keller, 64 Kans. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. 209; Blaisdell v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. 944. See also Goetz v. Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. ed. 515; Springs v. Hanover Nat. Bank, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241n; Hawkins v. Alfalfa Products Co., 152 Ky. 152, 153 S. W. 201, 44 L. R. A. (N. S.) 600. Contra, Landa v. Lattin Bros., 19 Tex. Civ. App. 246, 46 S. W. 48; Finch v. Gregg, 126 N. Car. 176, 35 S. E. 251, 49 L. R. A. 679 (overruled in Mason v. Nelson Cotton Co., 148 N. Car. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. 635); and see J. C. Haas & Co. v. Citizens' Nat. Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. 61; Searles v. Smith Grain Co., 80 Miss. 688, 32 So. 287. In the first case cited in this note it is also held that where several of such drafts transferred to the bank by sellers of hay were endorsed by the bank with a statement that it was not responsible for quantity, quality, or delivery of the goods covered by the bill of lading, it did not follow from this that the bank was, or intended to be responsible as to other drafts although they did not contain such statement. Compare also Hannay v. Guaranty Trust Co., 187 Fed. 686, with Guaranty Trust Co. v. Hannay, 210 Fed. 810.

[13] As to effect on preventing passage of title, see note to Hamilton v. Joseph Schlitz Brewing Co., 129 Iowa 172, 105 N. W. 438, in 2 L. R. A. (N. S.) 1078. As to rights and liabilities of assignee as against consignee who does not get the goods, or finds them defective, see notes to Cosmos Cotton Co. v.

§ 2151 (1430). **Duplicate bills.**—Where a bill of lading is issued in duplicate, one marked "Original" and one "Duplicate," the duplicate is, in effect, an original.[14] But if the bill of lading given to the shipper and the duplicate retained by the carrier differ, the former controls.[15] A purchaser of goods to be paid for on delivery of the bill of lading is bound to pay on the tender of a duly indorsed bill, which is effective to pass the property, notwithstanding that the bill was drawn in triplicate, and that all the copies were not tendered or accounted for.[16] If duplicate bills are given to the shipper, who indorses one which is attached to a draft, and forwards the other as a notice to the purchaser, the carrier must deliver only on the presentation of the indorsed copy.[17] Where a carrier issued original bills of lading to the

First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42; Central Mercantile Co. v. Oklahoma State Bank, 83 Kans. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954. And as to rights and liabilities of discounting bank, attaching creditors, and the like, see notes to Spring v. Hanover Nat. Bank, 209 N. Y. 224, 103 N. E. 156, in 52 L. R. A. (N. S.) 241; and Frontier Nat. Bank v. Solinger (Ind. App.), 126 N. E. 40; American Thresherman v. De Tamble Motors Co., 154 Wis. 366, 141 N. W. 210, in 49 L. R. A. (N. S.) 645. And see generally First Nat. Bank v. Felker, 185 Fed. 678; Bennett v. Dickinson, 106 Kans. 95, 186 Pac. 1005, 190 Pac. 757; McCotter v. Norfolk Southern Ry. Co., 178 N. Car. 159, 100 S. E. 326; 4 Elliott Cont. § 3165; 5 Id. § 5023; notes in 49 L. R. A. (N. S.) 644 and L. R. A. 1918D, 706. Shipper's negotiation of bill of lading with draft attached, by indorsement and delivery to a bank, vests in the bank title to the property and right of possession, and no attachable interest remains in the shipper nor can a dealer seeking to attach require the bank to account for the property or any excess in value over the face value of the original draft. Farmers &c. Nat. Bank v. Sprout, 104 Kans. 348, 179 Pac. 301. In Nashville &c. Ry. Co. v. Abramson &c. Produce Co., 199 Ala. 271, 74 So. 350, it is held that where a seller who is both consignor and consignee has indorsed the bill of lading the real purchaser, having paid the draft on the ostensible purchaser and received the goods may sue the carrier for their injury.

[14] Missouri P. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861.

[15] The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804; Ontario Bank v. Hanlon, 23 Hun (N. Y.) 283.

[16] Sanders v. McLean, L. R. 11 Q. B. Div. 327.

[17] Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; McEwen v. Jeffersonville &c. R. Co., 33 Ind.

order of the shipper, stating that the goods were in its possession to be delivered only on their presentation, and not conditioned to be void in case of delivery on duplicate bills, it was held that the fact that duplicate bills were also issued, and that the carrier had delivered the goods to the shipper on presentation and surrender of the duplicate bills did not relieve it from liability on the original bills to one who had taken them in good faith, as pledgee, to secure a loan made by him to the shipper upon such bills.[18] It is frequently stated as a general rule, however, that where bills of lading are issued in "sets" or "parts" to the order of the shipper or consignee, the property usually passes to the first indorsee or transferee,[19] and the carrier is justified in delivering the goods to him on presentation by him of one of the parts or sets, although there has been a prior indorsement or assignment to another person for value of another set or part, provided the carrier has no notice or knowledge thereof and acts in good faith, but in most of the cases in which this rule is announced the bills of lading provided that, one of them "being accomplished, the other shall stand void," or contained some other similar provision.[20] It should be noted, however, that in a few respects some of the rules stated in this section and, perhaps, in a few other instances, are modified or changed by the "Uniform Bills of Lading Act," or "Uniform Sales Act," adopted in a number of states.[21]

368, 5 Am. Rep. 216; Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. 504; Newcomb v. Boston &c. R. Co., 115 Mass. 230; Alderman v. Railroad, 115 Mass. 233; Lawrence v. Minturn, 17 How. (N. Y.) 100; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Merchants' Bank v. Union &c. Transportation Co., 69 N. Y. 374; Congar v. Galena &c. R. Co., 17 Wis. 477. See as to the rule where the indorsed duplicate is obtained by fraud, Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892.

[18] Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505.

[19] First Nat. Bank v. Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. 431. See also Meyerstein v. Barber, L. R. 2 C. P. 38.

[20] See Glyn &c. Co. v. East & West &c. Co., L. R. 7 App. Cas. 591. Compare Wichita Sav. Bank v. Atchison &c. R. Co., 20 Kans. 519, where carrier is held liable where it issues duplicate bills without marking them as duplicates.

[21] See Roland &c. Co. v. Brown, 214 Mass. 196, 100 N. E. 1025; also

§ 2152 (1431). **Change of consignment by shipper.**—Where the conditions of shipment are not such that delivery to the carrier vests the title in the consignee,[22] the consignor, not having forwarded the bill to the consignee or his representative,[23] may, after surrendering to the carrier the bill and all copies thereof[24] order the delivery to another consignee, even if the goods have at the time passed into the possession of a connecting carrier.[25] So, it has been held that where the consignor forbids a delivery to the consignee there is no presumption that the latter is the owner of the goods, and that the former, even after receiving a bill of lading, can make the delivery to the consignee conditional on the payment of a draft.[26]

§ 2153. **Federal Bill of Lading Act.**—By an Act of Congress, commonly known as the Federal Bill of Lading Act, approved August 29, 1916, which became effective January 1, 1917, some changes have been made in the common law rules as to bills of lading, especially as to the rights of bona fide purchasers or holders for value, in cases of interstate or foreign commerce, and some of the states have passed uniform bills of lading acts to the same effect in other cases. Bills of lading are therein classified as "straight bills," which are those stating that the goods are consigned or destined to a special person, and "order bills," which are those consigned or destined to the order of any person named

Federal Bill of Lading Act referred to in last section of this chapter.

[22] See supra under sub-title As Muniments of Title. If the title has vested in the consignee the carrier may not, of course, permit a change of destination without the consignee's consent. Philadelphia &c. R. Co. v. Wireman, 88 Pa. St. 264; Bailey v. Hudson River &c. R. Co., 49 N. Y. 70.

[23] Blanchard v. Page, 8 Gray (Mass.) 281; Mitchell v. Ede, 11 Ad. & El. 888; Ruck v. Hatfield, 5 Barn. & Ald. 632; Thompson v. Trail, 2 Car. & P. 334.

[24] Hubbersty v. Ward, 8 Exch. 330.

[25] Sutherland v. Second Nat. Bank, 78 Ky. 250; Chaffe v. Mississippi &c. R. Co., 59 Miss. 182. See post, § 2312.

[26] Louisville &c. R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183. See, generally, post, § 2291, et seq. And see as to "open and closed" shipments, Smith v. Landa, 45 Tex. Civ. App. 446, 101 S. W. 470. See also where consignment is to shipper "order notify." Hall & Co. v. Norfolk So. R. Co., 173 N. Car. 108, 91 S. E. 607.

therein; and it is enacted that any provision in an order bill or in any notice, contract, rule, regulation or tariff that it is nonnegotiable shall be null and void and shall not effect its negotiability within the meaning of the statute unless upon its face and in writing agreed to by the shipper. There are also provisions in regard to duplicate bills and various other matters, but the most important provision is in regard to negotiability and the rights of bona fide holders. The rule established by the Supreme Court of the United States in the Friedlander case,[27] and adopted in a majority of the states is modified by the provision of section 22 that "if a bill of lading has been issued by a carrier or on his behalf by an agent or employe, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) the consignee named in a straight bill, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue." Other provisions are also made as to the rights of and against the carrier and also as to the manner of negotiation and rights of persons other than the carrier as between themselves. There is some question as to whether the latter provisions are all constitutional and valid, but the statute seems to be constitutional, especially so far as the provisions relating to the carrier are concerned.[28] And section

[27] Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991.

[28] One merely having custody of an order bill of lading for another without right of property or interest in or control of it or right of possession beyond its safe keeping is not a "holder" within the meaning of the Federal Uniform Bill of Lading Act. J. F. French & Co. v. Pere Marquette Ry. Co., 204 Mich. 578, 171 N. W. 491. It has also been held that an assignee of the assignee of a straight bill of lading, in which the shipper was named as consignor and consignee acquired no more rights in the shipment than his assignor had. Quality Shingle Co. v. Old Oregon Lumber Co. (Wash.), 187 Pac. 705; and see also Getchell v. Northern Pac. R. Co. (Wash.), 187 Pac. 707. Under the Missouri statute bills of lading are made negotiable and it is provided that they may be transferred by indorsement in writing, "yet they are transferrable without in-

41, involving practically the whole act, has very recently been held constitutional and valid by the Supreme Court of the United States.[29]

dorsement for value, and then carry with them the property in the goods they cover." Kinsolving v. State Savings & Trust Co. (Mo. App.), 190 S. W. 378. See also King v. Barbarin, 249 Fed. 303. But compare Judson v. Minneapolis &c. R. Co., 131 Minn. 5, 154 N. W. 506. Where a shipment was originally from one state to another, but the bill of lading attached to a draft drawn on the purchaser indicated that the shipment was intrastate, the carrier was held to be estopped from asserting that the shipment was interstate as against a purchaser who paid the draft without knowledge that the shipment was originally from another state. Missouri &c. Ry. Co. v. Clement Grain Co. (Tex. Civ. App.), 211 S. W. 347.

[29] United States v. Ferger, 250 U. S. 199, 39 Sup. Ct. 445. See American Bar Assn. Journal, March 21, 1921, for a brief consideration of the Act and some proposed changes. The Transportation Act of 1920 contains a proviso as to the rule of liability in case of a carrier by water and a modification of the proviso as to time and manner of giving notice and filing claims and bringing suits. See Barnes' Fed. Code and Supplement of 1921, § 7976. See also post § 2171.

CHAPTER LXVII

THE INITIAL CARRIER

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§ 2160 (1432). Carrier not bound to carry beyond own line.—As a general rule at common law, no carrier is bound by the common law to accept and carry goods beyond the terminus of its own line.[1] In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the

[1] Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. ed. 325; Atchison T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Little Rock &c. R. Co. v. St. Louis &c. R. Co., 41 Fed. 559; State Public Utilities Com. v. Pittsburgh &c. R. Co., 290 Ill. 580, 125 N. E. 495; Taffe v. Oregon &c. Co., 41 Ore. 64, 68 Pac. 732, 58 L. R. A. 187, 190 (citing text); Bird v. Southern Ry. Co., 99 Tenn. 719, 42 S. W. 451, 452, 63 Am. St. 856; Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 306, 55 L. R. A. 481 (both citing text). See also Lotspeich v. Central R. &c. Co., 73 Ala. 306; Kansas City &c. R. Co. v. Sharp, 64 Ark. 115, 40 S. W. 781; Richmond &c. R. Co. v. Shomo, 90 Ga. 496, 16 S. E. 220; Coats v. Chicago &c. R. Co., 239 Ill. 154, 87 N. E. 929; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955, 959 (citing text). And it is held that a carrier may refuse to accept an interstate shipment for a point on a connecting line which has not complied with the requirements of the Interstate Commerce Act. Crescent

common-law duty of an independent carrier is performed by safely transporting the goods over its own line without unreasonable delay and delivering them to the consignee or connecting carrier, as the case may be.[2] If, in such a case, the goods are merely to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent rather than a carrier as to such further transportation, and is not liable at common law for the default of subsequent carriers.[3]

§ 2161 (1432a). Duties of initial carrier generally.—The whole duty of an initial carrier is not always performed, however, by merely tendering the goods to the connecting carrier. If the latter refuses to receive them, it is generally the duty of the initial carrier to notify the consignor or the consignee, without unreasonable delay, and to store or otherwise take care of the goods

Brewing Co. v. Oregon &c. R. Co., 24 Idaho 106, 132 Pac. 975. Compliance with such law is necessary before such a through shipment can be undertaken, but compliance may be presumed in a proper case. Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724.

[2] See post, § 2188. As to what will not excuse it from delivery to the connecting carrier, see Blodgett v. Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. 873; McLaren v. Detroit &c. R. Co., 23 Wis. 138. Where there is no express contract and no business connection between the two roads and no agent at their junction the first company is not liable for failure to deliver to such connecting carrier. St. Louis &c. R. Co. v. Marrs, 60 Ark. 637, 31 S. W. 42. "The general rule of law is that an intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee, without unreasonable delay, and store or otherwise take care of the goods while awaiting instructions. Having done this, the liability of the carrier as such will cease, and the liability of a warehouseman be substituted." Buston v. Pennsylvania R. Co., 119 Fed. 808, 811, citing text; Johnson v. Railroad Co., 33 N. Y. 610, 612, 88 Am. Dec. 416, Rawson v. Holland, 59 N. Y. 611, 615, 17 Am. Rep. 394.

[3] Roy v. Chesapeake &c. R. Co., 61 W. Va. 616, 57 S. E. 39, 40, 31 L. R. A. (N. S.) 1 (quoting text). But as to interstate shipments, see Carmack Amendment and later amendments of Hepburn law, hereafter referred to, and considered in the note to the above case as reported in 31 L. R. A. (N. S.) 1.

for a reasonable time while awaiting instructions,[4] and, in some cases, especially where the goods are known to be perishable, it may be the duty of the initial carrier, as a forwarding agent or depository, if an emergency exists, to forward them by some other carrier, if the carrier designated is unable to receive them.[5] So, where instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of such initial carrier to duly transmit them to the connecting carrier.[6] As we shall hereafter see, although the general rule is that an independent carrier is under no duty to transport goods beyond its own line, it may incur that obligation by holding itself out as a carrier beyond its own line, or may become liable for the default of connecting carriers by contact or by reason of some custom or arrangement which entitles the shipper to treat them as partners,[7] or under the Carmack and later amendments.[8]

§ 2162 (1433). No extraterminal liability unless by contract. —The general rule at common law is that a carrier is not liable beyond its own line unless by contract.[9] But if an initial carrier

[4] Lesinsky v. Great Western Dispatch, 10 Mo. App. 134; Louisville &c. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Petersen, In re, 21 Fed. 885; post, § 2188. See also Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Chesapeake &c. R. Co. v. O'Gara &c. Co., 144 Ky. 561, 139 S. W. 803.

[5] See Regan v. Grand Trunk R. Co., 61 N. H. 579. Compare also Louisville &c. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988.

[6] North v. Merchants' Transportation Co., 146 Mass. 315, 15 N. E. 779; Little Miami R. Co. v. Washburn, 22 Ohio St. 324; Dana v. New York &c. R. Co., 50 How. Pr. (N. Y.) 428, note in 40 Am. & Eng. R. Cas. 142; Patten v. Union Pac. R. Co., 29 Fed. 590; Colfax Mt. Fruit Co. v. Southern Pac. Co., 118 Cal. 648, 46 Pac. 668, 50 Pac. 775, 40 L. R. A. 78. So it may be its duty to deliver a freight bill and voucher to the connecting company in accordance with custom. Reynolds v. Boston &c. R. Co., 121 Mass. 291.

[7] See post, § 2184.

[8] See for Carmack amendment and review of decisions thereunder, note to St. Louis &c. Ry. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486, Ann. Cas. 1915B, 77, 80-89; and note to Roy v. Chesapeake &c. R. Co., 61 W. Va. 616, 57 S. E. 39, and Atlantic &c. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167, in 31 L. R. A. (N. S.) 1, 7.

[9] Sumner v. Walker, 30 Fed. 261; Savannah &c. R. Co. v. Harris, 26

contracts to deliver to a connecting line by a fixed time it will be liable for damages for injuries occurring on the connecting line because of the failure of the initial carrier to deliver at the agreed time, the injuries being such as were reasonably to be anticipated and contemplated by the parties.[10] So, by holding itself out as a common carrier of goods to a point beyond its own line, it may render itself liable for not receiving and carrying goods to such point.[11]

§ 2163 (1434). There may be liability by contract.—The carrier may contract so as to bind itself for the defaults of connecting carriers as well as for its own,[12] even though the extratermi-

Fla. 148, 7 So. 544, 23 Am. St. 551, 8 R. & Corp. L. J. 168, 42 Am. & Eng. R. Cas. 457; Lake Erie &c. R. Co. v. Condon, 10 Ind. App. 536, 38 N. E. 71; Pennsylvania Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538; Berg v. Atchison &c. R. Co., 30 Kans. 561, 2 Pac. 639; Louisville &c. R. Co. v. Tarter, 19 Ky. L. 229, 39 S. W. 698 (citing text); Louisville &c. R. Co. v. Chestnut & Bro., 24 Ky. L. 1846, 72 S. W. 351, 352 (citing text); Crouch v. Louisville &c. R. Co., 42 Mo. App. 248; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, and note; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221; Piedmont M. Co. v. Columbia &c. R. Co., 19 S. Car. 353; Hunter v. Southern P. R. Co., 76 Tex. 195, 13 S. W. 190, 42 Am. & Eng. R. Cas. 501; McConnell v. Norfolk &c. R. Co., 86 Va. 248, 9 S. E. 1006, 13 Va. L. J. 594, 6 R. & Corp. L. J. 406, 40 Am. & Eng. R. Cas. 155, 17 Wash. L. R. 583; Roy v. Chesapeake &c. Ry. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1n; Detroit &c. R. Co. v. Farmers' &c. Bank, 20 Wis. 122. As we shall hereafter see, however, the contract may sometimes be implied.

[10] Fox v. Boston &c. R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. Compare also Pereira v. Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988; Carter v. Chicago &c. R. Co., 146 Iowa 201, 125 N. W. 94; Illinois Cent. R. Co. v. Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758. And as already indicated, there may be a liability under the Carmack amendment. See Chicago &c. R. Co. v. Latta, 266 U. S. 491, 57 L. ed. 328, 33 Sup. Ct. 155; Produce Trading Co. v. Norfolk Southern R. Co., 178 N. Car. 175, 100 S. E. 316, and supra note 8.

[11] Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 326, 61 Am. & Eng. R. Cas. 135; Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Cobb v. Illinois Cent. R. Co., 38 Iowa 601. See also Ins. Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679; Crouch v. London &c. R. Co., 14 C. B. 255.

[12] Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Railroad

nal carriage extend into another state or country.[13] This proposition, though now well-established, was questioned in earlier cases on the grounds that contracts for liability beyond termini specified in charters were ultra vires.[14] If the carrier thus contracts to

Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. ed. 325; Southern Express Co. v. Shea, 38 Ga. 519; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749, and note; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Wabash &c. R. Co. v. Harris & Co., 55 Ill. App. 159; Chicago &c. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; St. Louis &c. R. Co. v. Piper, 13 Kans. 505; Bryan v. Memphis &c. R. Co., 11 Bush (Ky.) 597; Johnson v. Toledo &c. R. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. 464; Davis v. Jacksonville &c. Line, 126 Mo. 69, 28 S. W. 965; Jennings v. Grand T. R. Co., 52 Hun 227, 23 N. Y. St. 15, 5 N. Y. S. 140, affirmed in 127 N. Y. 438, 28 N. E. 394; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Van Buskirk v. Roberts, 31 N. Y. 661; Root v. Great Western R. Co., 45 N. Y. 524; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Swift v. Pacific &c. Co., 106 N. Y. 206, 12 N. E. 583; Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77; Pennsylvania R. Co. v. Berry, 68 Pa. St. 272; Page v. Chicago &c. R. Co., 7 S. Dak. 297, 64 N. W. 137; East Tennessee &c. R. Co. v. Nelson, 1 Cold. (Tenn.) 272; Noyes v. Rutland &c. R. Co., 27 Vt. 110; Newell v. Smith, 49 Vt. 255; Peet v. Chicago &c. Railway, 19 Wis. 118; Wahl v. Holt, 26 Wis. 703. See also Schwartz v. Panama R. Co., 155 Cal. 742, 103 Pac. 196; Pittsburgh &c. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735; Berger v. Chicago &c. R. Co., 159 Wis. 256, 150 N. W. 496, 499 (citing text). It may so contract, even though it is only a connecting line with that to which the goods were originally delivered by the shipper. Beard v. St. Louis &c. R. Co., 79 Iowa 527, 44 N. W. 803. In Kansas &c. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 704, a contract by a receiver to carry beyond the terminus of the line under his control was held valid. And to same effect is Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269.

[13] Burtis v. Buffalo &c. R. Co., 24 N. Y. 269; Benett v. Peninsular S. Co., 6 Com. B. 775; Phillips v. North Carolina Co., 78 N. Car. 294; Lindley v. Richmond &c. R. Co., 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31; McCarn v. International &c. R. Co., 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. 51, 55 Am. & Eng. R. Cas. 406.

[14] See Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Hill Manufacturing Co. v. Boston &c. Railroad, 104 Mass. 122, 6 Am. Rep. 202; Perkins v. Portland &c. R. Co., 47 Maine 573; Schroeder v. Hudson River &c. Railroad, 5 Duer (N. Y.) 55; Bissell v. Michigan &c. R. Co., 22 N. Y. 258; Buffett v. Troy &c. Railroad, 40 N. Y. 168,

carry to and deliver at a point on a connecting railroad, it may be liable for delay in delivery which occurs on the connecting road at the point to which the goods were consigned,[15] as well as for injury to the goods while in the hands of the connecting carrier.

§ 2164 (1435). What constitutes such a contract.—The English rule, as declared in Muschamp's case, is that a contract by the initial carrier for liability beyond its line may be inferred by the jury from the fact that it accepts goods directed to a point off its line without by positive agreement limiting its liability to the transportation on its line.[16] This rule has been followed by many American courts.[17] The majority of our courts, however, have

Root v. Great Western Railroad, 45 N. Y. 524; Baltimore &c. Steamboat Co. v. Brown, 54 Pa. St. 77; Western &c. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; Noyes v. Rutland &c. Railroad, 27 Vt. 110; Wilby v. West Cornwall Railway, 2 Hurl. & N. 703. In Connecticut such contracts have often been held to be void. Hood v. New York &c. R. Co., 22 Conn. 502; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Converse, v. Norwich Transportation Co., 33 Conn. 166.

[15] Savannah &c. R. Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. 92; Central &c. R. Co. v. Georgia &c. Exchange, 91 Ga. 389, 17 S. E. 904, 55 Am. & Eng. R. Cas. 606; Pereira v. Central R. Co., 66 Cal. 92, 4 Pac. 988.

[16] Muschamp v. Lancaster &c. R. Co., 8 M. & W. 421; Scothorn v. South &c. R. Co., 8 Exch. 341; Crouch v. Great Western Railway, 2 Hurl. & N. 491; Great Western R. Co. v. Crouch, 3 Hurl. & N. 183; Wilby v. West Cornwall Railway, 2 Hurl. & N. 703; Watson v. Ambergate Railway, 15 Jur. 448; Webber v. Great Western Railway, 3 H. & C. 771. The difference between the English and the American rule is stated in Taffe v. Oregon &c. Co., 41 Ore. 64, 68 Pac. 732, 58 L. R. A. 187, 190, 191 (citing text). In Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468, it was held a contract by an initial carrier to carry goods over its own and connecting lines to their destination, providing that it shall not be liable for loss or damage occurring after the goods shall have arrived at the stations on the initial carrier's line nearest to the points to which they are consigned, or beyond its limits, will not relieve it from liability for loss or damage occurring during transportation beyond the limits of its own and on a connecting line.

[17] Mobile &c. R. Co. v. Copeland, 63 Ala. 219, 35 Am. Rep. 13; Louisville &c. R. Co. v. Meyer, 78 Ala 597; Alabama &c. R. Co. v. Mount Vernon Co., 84 Ala. 173, 4 So. 356; but see Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Southern R. Co. v.

held, in accordance with what is called the American rule, that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extraterminal liability, and that, in the absence of an express contract, or of more significant facts or specifications than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier.[18] As to what will, under

Goldstein Bros., 146 Ala. 386, 41 So. 173; Chicago &c. R. Co. v. Cotton, 87 Ark. 339, 112 S. W. 742; Pereira v. Central Pac., 66 Cal. 92, 4 Pac. 988; Bennett v. Filvaw, 1 Fla. 403; Mosher v. Southern Ex. Co., 38 Ga. 37; Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. 58; Savannah &c. R. Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. 92; Atlanta &c. R. Co. v. Texas G. Co., 81 Ga. 602, 9 S. E. 600; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Chicago &c. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Adams Ex. Co. v. Wilson, 81 Ill. 339; Wabash &c. R. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Illinois Match Co. v. Chicago &c. R. Co., 250 Ill. 396, 95 N. E. 492; Ohio &c. R. Co. v. Emrich, 24 Ill. App. 245; Angle v. Mississippi &c. Railroad, 9 Iowa 487; Beard v. St. Louis &c. R. Co., 79 Iowa 527, 44 N. W. 803, 42 Am & Eng. R. Cas. 509; Halliday v. St. Louis &c. R., 74 Mo. 159, 41 Am. Rep. 309; Nashua Lock Company v. Worcester &c. Railroad, 48 N. H. 339, 2 Am. Rep. 242; Weed v. Saratoga &c. R. Co., 19 Wend. (N. Y.) 534; Baltimore &c. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Bradford v. South Car. R. Co., 7 Rich. L. (S. Car.) 201; Carter v. Peck, 36 Tenn. 203, 67 Am. Dec. 604; Western & At. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; Cummins v. Dayton &c. R. Co., 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356; Windmiller v. Northern Pac. R. Co., 52 Wash. 613, 101 Pac. 225; Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791; Berger v. Chicago &c. R. Co., 159 Wis. 256, 150 N. W. 496, 499 (citing text); East Tenn. &c. R. Co. v. Brumley, 9 Am. & Eng. R. Cas. 356. Compare also Atchison &c. R. Co. v. Davis, 34 Kans. 199, 8 Pac. 146, 25 Am. & Eng. R. Cas. 305; Merchants Dispatch &c. Co. v. Bloch, 86 Tenn. 393, 6 S. W. 881, 6 Am. St. 847; Crawford v. Great Western R. Co., 18 U. C. C. P. 510; Brant v. Northern Pac. R. Co., 22 Ont. R. 645; St. Louis &c. R. Co. v. Elgin &c. Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238.

[18] Stewart v. Terre Haute &c. R. Co., 1 McCrary (U. S.) 312, 3 Fed. 768; Railroad Co. v. Manf. Co., 16 Wall. (U. S.) 318, 21 L. ed. 397; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Myrick v. Michigan &c. R. Co., 107 U. S.

the American rule, constitute a sufficient basis for the implication

102, 1 Sup. Ct. 425, 27 L. ed. 325; Texas & P. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358; Louisville &c. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 25 Sup. Ct. 745, 49 L. ed. 1135; Hood v. New York &c. R. Co., 22 Conn. 502; Elmore v. Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143; Savannah &c. R. Co. v. Harris, 26 Fla. 148, 7 So. 544; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Pennsylvania Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538; Hill v. Burlington &c. R. Co., 60 Iowa 196, 14 N. W. 249; Berg v. Atchison &c. R. Co., 30 Kans. 561; Perkins v. Portland &c. R. R. Co., 47 Maine 573, 74 Am. Dec. 507; Skinner v. Hall, 60 Maine 477; Inhabitants of Plantation v. Hall, 61 Maine 517; Taylor v. Maine Cent. R. Co., 87 Maine 299, 32 Atl. 905; Baltimore &c. R. Co. v. Schumacher, 29 Md. 168, 96 Am. Dec. 510; Darling v. Boston &c. R. Co., 11 Allen (Mass.) 295; Nutting v. Connecticut &c. R. Co., 1 Gray (Mass.) 502; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031; Rickerson &c. Co. v. Grand Rapids &c. R. Co., 67 Mich. 110, 34 N. W. 269, 32 Am. & Eng. R. Cas. 487; Irish v. Milwaukee &c. R. Co., 19 Minn. 376, 18 Am. Rep. 340; Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519; Crawford v. Southern R. Assn., 51 Miss. 222, 24 Am. Rep. 626; Grover &c. Co. v. Missouri Pac. R. Co., 70 Mo. 672, 35 Am. Rep. 444; Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 S. W. 233; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, and note; Van Santvoord v. St. John, 6 Hill (N. Y.) 158; Root v. Great Western R. Co., 45 N. Y. 524; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Phillips v. North Car. R. Co., 78 N. Car. 294; Knott v. Raleigh &c. R. Co., 98 N. Car. 73, 3 S. E. 735, 2 Am. St. 321; Camden &c. R. Co. v. Forsyth, 61 Pa. St. 81; Clyde v. Hubbard, 88 Pa. St. 358; Knight v. Providence &c. Railroad, 13 R. I. 572, 43 Am. Rep. 46; Harris v. Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Hunter v. Southern &c. R. Co., 76 Tex. 195, 13 S. W. 190, 42 Am. & Eng. R. Cas. 501; Farmers' &c. Bank v. Champlain Trans. Co., 23 Vt. 186, 56 Am. Dec. 68; Brintnall v. Saratoga &c. Railroad, 32 Vt. 665; Hadd v. United States &c. Ex. Co., 52 Vt. 335, 36 Am. Rep. 757; McConnell v. Norfolk &c. R. Co., 86 Va. 248, 9 S. E. 1006; Roy v. Chesapeake &c. R. Co., 61 W. Va. 616, 57 S. E. 39, 31 L. R. A. (N. S.) 1 (where authorities on both sides are cited by states in the note). The text is cited and the American rule is approved as the better rule in Taffe v. Oregon &c. Co., 41 Ore. 64, 68 Pac. 732, 58 L. R. A. 187, 190, 191. The text is also cited in Louisville &c. R. Co. v. Tarter, 19 Ky. L. 229, 39 S. W. 698. See also St. Louis &c. R. Co. v. Neahly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Hewett v. Chicago &c. R. Co., 63 Iowa 611,

of a contract, nothing very definite can be said.[19] A contract will not necessarily be implied even from the shipper's payment or guaranty to the initial carrier of through freight.[20] And this is

19 N. W. 790, 18 Am. & Eng. R. Cas. 568; Mobile &c. R. Co. v. Tupelo &c. Co., 67 Miss. 35, 7 So. 279, 19 Am. St. 262; Fremont &c. R. Co. v. Waters, 50 Nebr. 592, 70 N. W. 225; Dunbar v. Port Royal &c. R. Co., 36 S. Car. 110, 15 S. E. 357, 31 Am. St. 860, 55 Am. & Eng. R. Cas. 466. But here again we may encounter the Carmack amendment.

[19] As to such contracts see Harris v. Grand Trunk R. Co., 15 R. I. 371, 5 Atl. 305; Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 403; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Railroad Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724; Ellsworth v. Tartt, 26 Ala. 733, 62 Am. Dec. 749; Hood v. Railroad, 22 Conn. 1; Elmore v. Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143; Robinson v. Merchants' D. T. Co., 45 Iowa 470; Knight v. Portland &c. R. Co., 56 Maine 234, 96 Am. Dec. 449; Stimpson v. Connecticut &c. R. Co., 98 Mass. 83, 93 Am. Dec. 140; Hill Man. Co. v. Boston &c. R. Co., 104 Mass. 122, 6 Am. Rep. 202; Hartan v. Eastern R. Co., 114 Mass. 44; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, and note; Berg v. Narragansett Steamship Co., 5 Daly (N. Y.) 394; Kessler v. New York &c. R. Co., 7 Lans. (N. Y.) 62; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Root v. Great Western R. Co., 45 N. Y. 524; Milnor v. New York &c. R. Co., 53 N. Y. 363; Nashville &c. R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; Candee v. Pennsylvania Railroad, 21 Wis. 582, 94 Am. Dec. 566. The receipt considered in Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791, was as follows: "Shipped by R. P. & Co., the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay." "Consigned to H. & K. Onekama, Mich." It was held that this was a contract to carry the goods to Onekama, there being nothing in the instrument limiting defendant's liability to its own route. For construction of contract by trustees in possession of a railroad, see Tolman v. Abbot, 78 Wis. 192, 47 N. W. 264. A railroad company which received goods at Akron, Pennsylvania, for St. Augustine, Florida, marked "via Philadelphia, care Atlantic Coast Line Fast Freight," and forwarded the goods from Philadelphia by steamer, was held liable for a loss by fire on the steamer. Philadelphia &c. R. Co. v. Beck, 125 Pa. St. 620, 17 Atl. 505, 11 Am. St. 924.

[20] Hill v. Burlington &c. R. Co., 60 Iowa 196, 14 N. W. 249; Tayler v. Maine Cent. R. Co., 87 Maine 299, 32 Atl. 905; Washburn &c. Co.

particularly true, in the absence, of any statute or act of Congress to the contrary where the provisions of the bill of lading or other circumstances indicate that the initial carrier does not undertake through shipment but, on the contrary, limits its liability to its own line.[21] An undertaking, however, in the receipt for the goods,

v. Providence &c. R. Co., 113 Mass. 490; Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 So. 330; Lamb v. Camden &c. R. Co., 46 N. Y. 271, 7 Am. Rep. 327; but compare Condict v. Grand Trunk R. Co., 4 Lans. (N. Y.) 106, affirmed in 54 N. Y. 500; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Meredith v. Seaboard &c. R. Co., 137 N. Car. 478, 50 S. E. 1; Camden R. Co. v. Forsyth, 61 Pa. St. 81; Piedmont Mfg. Co. v. Columbia, etc. R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194. See also McConnell v. Norfolk &c. R. Co., 86 Va. 248, 9 S. E. 1006; Ft. Worth &c. R. Co. v. Williams, 77 Tex. 121, 13 S. W. 637, 42 Am. & Eng. R. Cas. 464. But a company receiving goods marked for delivery beyond its line and requiring of the shipper an advance deposit equal to the amount to be earned by the several carriers over the entire distance, is bound to so deliver the goods into the possession of the carrier connecting with it as to place the latter under the same obligation as if the goods had been received from the consignor with advance payment of freight. Palmer v. Chicago &c. R. Co., 56 Conn. 137, 13 Atl. 818. A contract to transport and to deliver goods to the road's connecting lines for transportation to a destination off its line, at a fixed rate for the whole distance, held to be a through bill of lading. Gulf &c. R. Co. v. Vaughn (Tex.), 16 S. W. 775. And in some jurisdictions shipment under a through bill of lading with such payment or guaranty is held to constitute a through contract. St. Louis &c. R. Co. v. Randle, 85 Ark. 127, 107 S. W. 669; Central R. &c. Co. v. Georgia Fruit &c. Co., 91 Ga. 389, 17 S. E. 904; Central R. &c. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Eckles v. Missouri &c. R. Co., 112 Mo. App. 240, 87 S. W. 99. See also Pittsburg &c. R. Co. v. Bryant, 36 Ind. App. 340, 75 N. E. 829, with which compare, however, Pennsylvania Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538. As will be seen some of these cases are in jurisdictions in which the mere acceptance of shipments to a point on another line without such prepayment or guaranty does not ordinarily constitute a contract for binding the initial carrier for through shipment.

[21] Fremont &c. R. Co. v. New York &c. R. Co. (Union State Bank v. Fremont &c. R. Co.), 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Robinson v. New York &c. R. Co., 63 App. Div. 211, 71 N. Y. S. 424, affirmed in 177 N. Y. 565, 69 N. E. 1130; Reid v. Southern R. Co., 153 N. Car. 490, 69 S. E. 618. See also Wasburn &c. Mfg. Co. v. Providence &c. R. Co., 113 Mass. 490; Fowles v. Great Western R. Co., 7 Exch. 699.

"to forward" them beyond its line, has been held to bind the initial carrier for the entire carriage,[22] but most of the decisions to this effect are in jurisdictions which follow the English rule, and there are authorities to the contrary.[23] The fact that the initial company named the through rate and collected the entire charge has been held, in some jurisdictions, to be a circumstance strongly tending to show a contract for through transportation by it, or such a "connection in business" as to make the first carrier liable over the entire route.[24] What constitutes such a con-

[22] St. Louis &c. R. Co. v. Piper, 13 Kans. 505; Davis v. Jacksonville &c. Line, 126 Mo. 69, 28 S. W. 965; Nashua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115; Wilcox v. Parmelee, 3 Sand. (N. Y.) 610; Schroeder v. Hudson River &c. R., 5 Duer (N. Y.) 55; Simmons v. Law, 42 N. Y. 217; East Tennessee & Va. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589; Cutts v. Brainerd, 42 Vt. 566, 1 Am. Rep. 353. See also Davis v. Jacksonville &c. Line, 126 Mo. 69, 28 S. W. 965; Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68.

[23] Devillien v. The John Bell, 6 La. Ann. 544; Lowell Wire Fence Co. v. Sargent, 8 Allen (Mass.) 189; McEacheran v. Mich. Cent. R. Co., 101 Mich. 264, 59 N. W. 612; Crawford v. Southern R. Assn., 51 Miss. 222, 24 Am. Rep. 626; Reed v. United States Ex. Co., 48 N. Y. 462, 8 Am. Dec. 561; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; American Ev. Co. v. Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268; Dunbar v. Port Royal &c. R. Co., 36 S. Car. 110, 15 S. E. 357, 31 Am. St. 860, 55 Am. & Eng. R. Cas. 466. See also Central R. &c. Co. v. Bridger, 94 Ga. 471, 20 S. E. 349. To "forward" may mean to carry or transport, and even under the American rule a contract "to forward" to destination beyond the carrier's line may bind it beyond its line. Much necessarily depends upon the wording of the particular contract or circumstances of the case. See Colfax &c. Fruit Co. v. Southern Pac. Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78, and Kansas, New York and Missouri cases cited in the first part of this note.

[24] Ogdensburg &c. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 132, 22 L. ed. 827; Hill &c. Co. v. Boston &c. R. Co., 104 Mass. 122, 6 Am. Rep. 202; Nashua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Condict v. Grand Trunk R. Co., 4 Lans. (N. Y.) 106; Weed v. Saratoga &c. R. Co., 19 Wend. (N. Y.) 534; Root v. Great Western R. Co., 45 N. Y. 532; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602; Page v. Chicago &c. R. Co., 7 S. Dak. 297, 64 N. W. 137; Camden v. Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566. This, of course, would follow whenever the courts have adopted the

tract is a matter of general law, upon which the federal courts will exercise their own judgment, and the decisions of the state court are not binding upon them.[25]

§ 2165 (1436). Illustrative cases.—In Illinois, although the rule in Muschamp's case is followed in that state, it has been held that the receipt of goods in New York, addressed to Bloomington, Illinois, did not bind the carrier to deliver the goods at Bloomington where the bill of lading, after acknowledging the receipt of the goods so addressed, specified that they were to be forwarded to "Chicago depot only."[26] So an offer by a common carrier to "take" peas from a point on its line to a point on another line via a certain route has been held to be merely an offer to take them for carriage over its own line and then to deliver them to the next carrier on the route named, to be forwarded by the latter.[27] In another case the agent of a railroad company received goods which the shipper desired to send to Monroe, Louisiana, a point beyond the terminus of such road, and executed a bill of lading acknowledging the receipt of such goods "to be laden on the freight car, 1 bale bedding, J. F. Phillips, Monroe, La., marks, etc., as per margin (condition of contents unknown) to —— or assigns, at —— station," at the same time saying to the shipper that the goods would reach Monroe in good condi-

rule in Muschamp's case, but in other jurisdictions the weight of authority is that such fixing of through rates and receiving payment thereof is not of itself sufficient to make the carrier liable over the entire route. But it may be important in connection with other matters and make the case one for the jury. See Ogdensburg &c. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Pereira v. Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988; Central R. &c. Co. v. Georgia &c. Co., 91 Ga. 389, 17 S. E. 904; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98; Philadelphia &c. R. Co. v. Ramsey, 89 Pa. St. 474; Page v. Chicago &c. R. Co., 7 S. Dak. 297, 64 N. W. 137.

[25] Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. ed. 325.

[26] Merchants' &c. Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541. See Wabash &c. R. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641.

[27] Harris v. Grand Trunk R., 15 R. I. 371, 5 Atl. 305 and note. See also Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. ed. 325.

tion in a few days. The court held that this was not sufficient to show a special contract on the part of the company to carry to Monroe and there deliver the goods to the plaintiff.[28] In another case the carrier gave a receipt for the goods "in good order, to be delivered in like good order," and placed on the margin thereof the consignee's name and address, the latter being a point beyond defendant's line on a connecting road. Cards were also put on the goods, giving the name and address of the consignee and the name of the connecting road. It was held that this did not constitute a contract for through carriage so as to render the first carrier liable for loss beyond its own line.[29] On the other hand, where a bill of lading was issued by an association of several railroads in the name of the association, whereby it agreed, without naming any of the railroad companies, to carry goods from Boston to Chicago, and there deliver them to connecting lines to be forwarded to Denver, it was held that it was a special through contract to Chicago, and that the constituent companies were liable jointly and severally for any loss or damage to the goods between Boston and Chicago, notwithstanding a provision that in case of loss or damage to the goods "that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof."[30] Substantially the same view was taken by another court in a similar case recently decided.[31] In another case a box was de-

[28] Phillips v. North Carolina R. Co., 78 N. Car. 294. See also Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519. But compare Blackmer &c. Pipe Co. v. Mobile &c. R. Co., 137 Mo. App. 133, 119 S. W. 13.

[29] Wright v. Boughton, 22 Barb. (N. Y.) 561.

[30] Block v. Fitchburgh R. Co., 139 Mass. 308, 1 N. E. 348. The court construed the exemption from liability as referring to the acts or defaults of the companies beyond Chicago. See also International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Milne v. Douglass, 13 Fed. 37; Lindley v. Richmond &c. R. Co., 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31; Baltimore &c. Co. v. Brown, 54 Pa. St. 77; Clyde v. Hubbard, 88 Pa. St. 358; Cummins v. Dayton &c. Co., 9 Am. & Eng. R. Cas. 36. But compare Hot Springs &c. R. Co. v. Trippe, 42 Ark. 465, 48 Am. Rep. 65.

[31] Southard v. Minneapolis &c. R. R. Co., 60 Minn. 382, 62 N. W. 442.

livered to a railroad company for shipment beyond its line, and a receipt was executed by it describing the goods, with the consignee's name and address, and containing a promise upon the part of the company to forward them by its railroad and deliver them "to —— at its depot in ——." The blanks were in a regular printed form, and were so left when the receipt was executed. It was held that this constituted a special contract to carry the goods to their destination, although it was beyond the line of such company.[32] So, where a bill of lading was given for goods for shipment beyond the company's line, and there was a stipulation in writing that such company should carry them to their destination at a certain fixed rate, it was held that this was a contract for through carriage by it, and that the written portion of the contract must prevail over the printed portion, which tended to show that the company acted merely as a forwarding agent.[33]

§ 2166 (1437). Authority of agents as to extraterminal liability.—The courts following the English rule announced in Muschamp's case hold that an agent's authority to receive goods for carriage implies authority to contract for extraterminal liability,[34]

[32] Cutts v. Brainerd, 42 Vt. 566, 1 Am. Rep. 353. This case can hardly be reconciled with some of those referred to in the first part of this section. See however Fortier v. Pennsylvania Co., 18 Ill. App. 260.

[33] Peet v. Chicago &c. R. Co., 19 Wis. 131, 20 Wis. 594, 91 Am. Dec. 446. See also St. Louis &c. R. Co. v. Lained, 103 Ill. 293, and see for other illustrative cases upon the general subject, note in 31 L. R. A. (N. S.) 541.

[34] Watson v. Ambergate Railway, 15 Jurist 448; Scothorn v. South &c. R. Co., 8 Exch. 341; Bristol &c. R. Co. v. Collins, 7 H. L. Cas. 194. See also Riley v. New York &c. R. Co., 34 Hun (N. Y.) 97; Wiggins Ferry Co. v. Chicago &c. R. Co., 73 Mo. 389, 39 Am. Rep. 519; Baugh v. McDaniel, 42 Ga. 641; Nichols v. Oregon &c. R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778. It has been held unnecessary to prove the express authority of the agent to make such a contract, when he acted as such in the proper place for receiving goods for the company, and was in possession of the company's stamp to be used on such receipts. Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791. But see Turner v. St. Louis &c., 20 Mo. App. 632; Patterson v. Kansas City &c. R. Co., 47 Mo. App. 570, and Crouch v. Louisville &c. R. Co., 42 Mo. App. 248, holding that a station agent or a soliciting agent has no power to make such agreement for

while the others deny the implication.[35] Although a general freight agent may have this power, we think the better rule is that a local station agent has no such implied authority, unless he has in some manner been held out as having it. And it has been held that such authority will not be inferred from the mere fact that he has collected freight in the particular instance for the transportation of the goods to their destination on a connecting line.[36] Nor has the general freight agent of the receiving line implied authority to bind a connecting line by fixing the freight rate over it.[37] But the authority of an agent to contract for carriage beyond the terminus of the line of his company, or the like, may sometimes be implied from the fact that he is held out to the world as having such authority, or has been permitted to exercise it in other cases.[38]

the company, unless expressly conferred or implied from previous conduct. It is held in the same state, however, that a general freight agent has the power. Grover &c. M. Co. v. Missouri &c. R. Co., 70 Mo. 672, 35 Am. Rep. 444; White v. Missouri &c. R. Co., 19 Mo. App. 400; Loomis v. Wabash &c. R. Co., 17 Mo. App. 340. See also Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269.

[35] Burroughs v. Norwich &c. R. Co., 100 Mass. 26, 1 Am. Rep. 78. See also McLogan v. Chicago &c. R. Co., 116 Iowa 183, 89 N. W. 233; Hoffman v. Cumberland Val. R. Co., 85 Md. 391, 37 Atl. 214; Sutton v. Chicago &c. R. Co., 14 S. Dak. 111, 84 Pac. 396.

[36] Coates v. Chicago &c. R. Co., 8 S. Dak. 173, 65 N. W. 1067; Page v. Chicago &c. R. Co., 7 S. Dak. 297, 64 N. W. 137. In Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 131, 132, 22 L. ed. 827, it was held a question of fact for the jury. See also Lake Erie &c. R. Co. v. Seeley, 43 Ind. App. 70, 86 N. E. 1002; Wood v. Chicago &c. R. Co., 59 Iowa 196, 13 N. W. 99. A station agent has no implied authority to make a contract unlawfully discriminating in favor of one shipper. Myar v. St. Louis &c. R. Co., 71 Ark. 552, 76 S. W. 557. See also Southern R. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454.

[37] Hill v. Burlington &c. R. Co., 60 Iowa 196, 14 N. W. 249, 9 Am. & Eng. R. Cas. 21. See also Gulf &c. R. Co. v. Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355.

[38] See Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 131, 132, 22 L. ed. 827, 830; Mayall v. Boston &c. R. Co., 19 N. H. 122, 49 Am. Dec. 149; Wilcox v. Chicago &c. R. Co., 24 man, 99 Tex. 349, 89 S. W. 971. 2 R. Co., 62 Mo. 527; Gulf &c. R. Co. v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391. And see Gulf &c. R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968; Gulf &c. R. Co. v. Zimmer-Minn. 269; Pruitt v. Hannibal &c.

§ 2167 (1438). Exclusion of liability by contract.—At common law all extraterminal liability may be excluded by the carrier by an express contract.[39] This would seem to follow from the

L. R. A. (N. S.) 386n. But compare Blackburn v. Chicago &c. R. Co., 52 Tex. Civ. App. 443, 115 S. W. 874.

[39] Myrick v. Michigan &c. R. Co., 107 U. S. 102, 27 L. ed. 325; Alabama &c. R. Co. v. Thomas, 83 Ala. 343, 3 So. 802; Jones v. Cincinnati &c. R. Co., 89 Ala. 376; Central R. Co. v. Chicago Varnish Co., 169 Ala. 287, 53 So. 832; Central R. & Bkg. Co. v. Avant, 80 Ga. 195, 5 S. E. 78; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Ohio &c. R. Co. v. Emrich, 24 Ill. App. 245; United States Ex. Co. v. Rush, 24 Ind. 403; Hartley v. St. Louis &c. R. Co., 115 Iowa 612, 89 N. W. 88; Berg v. Atchison &c. R. Co., 30 Kans. 561, 2 Pac. 639; Inhabitants of Plantation v. Hall, 61 Maine 517; Pendergast v. Adams Ex. Co., 101 Mass. 120; Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031; Rickerson &c. Co. v. Grand Rapids &c. Railroad, 67 Mich. 110, 34 N. W. 269;McEacheran v. Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519; Dodge v. Chicago &c. R. Co. (Minn.), 126 N. W. 627; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 So. 698; American Ex. Co. v. Second Nat. Bank, 69 Pa. St. 394; Keller v. Baltimore &c. R. Co., 196 Pa. St. 57, 46 Atl. 261; Harris v. Grand Trunk Railway, 15 R. I. 371, 5 Atl. 305; Bethea v. Northwestern R. Co., 26 S. Car. 91, 1 S. E. 372, note in 88 Am. St. 102; Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. 856; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Texas &c. R. Co. v. Hawkins (Tex.), 30 S. W. 1113; Hunter v. Southern Pac. Railroad, 76 Tex. 195, 13 S. W. 190; McConnell v. Norfolk &c. R. Co., 86 Va. 248, 9 S. E. 1006; Tolman v. Abbot, 78 Wis. 192, 47 N. W. 264; Beaumon v. Canadian B. R. Co., Montreal L. R. 5 Super. Ct. 255; Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468. See also Hanse v. Wabash &c. R. Co., 56 Mo. App. 476; Contra, Baker v. Missouri P. R. Co., 34 Mo. App. 98; and compare St. Louis &c. R. Co. v. Elgin &c. Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238; Central &c. R. Co. v. Kavanaugh, 92 Fed. 56; Smeltzer v. St. Louis &c. R. Co., 158 Fed. 649; Ireland v. Mobile &c. R. Co., 105 Ky. 400, 20 Ky. L. 1586, 49 S. W. 188, 453; Galveston &c. R. Co. v. Allison, 59 Tex. 193; Best v. Great Northern Ry. Co., 159 Wis. 429, 150 N. W. 484. If the bill provides that there shall be no liability for negligence of connecting lines, the carrier is not responsible for delay in delivering goods in time for a particular market, where it is not shown the delay occurred on its own line. Mobile &c. R. Co. v. Francis (Miss.), 9 So. 508. Such a con-

common-law rule that a carrier is not bound to receive and transport goods beyond its own line.[40] Such a limiting contract was held valid as to interstate commerce,[41] before the Interstate Commerce Act and amendments, and has been held binding, even though the shipper could not read, and was not aware that the limiting clause was in the bill.[42] It has been held, however, that such a contract must be specially pleaded by the railroad company,[43] and where the connecting lines over which a through

tract having been made, it is proper to refuse to direct a verdict for defendant where the evidence fails to show that the goods were delivered safely to the connecting line. Georgia Pac. R. Co. v. Hughart, 90 Ala. 36, 8 So. 62.

[40] Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Lotspeich v. Central R. Co., 73 Ala. 306; Richmond &c. R. Co. v. Shomo, 90 Ga. 496, 16 S. E. 220.

[41] Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56. See also Armstrong v. Galveston &c. R. Co., 92 Tex. 117, 46 S. W. 33; Houston &c. R. Co. v. Smith (Tex. Civ. App.), 97 S. W. 836; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688; Hart v. Chicago &c. R. Co., 69 Iowa 485, 29 N. W. 597; McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110; Richmond &c. R. Co. v. Patterson Tobacco Co., 92 Va. 670, 21 S. E. 261, 41 L. R. A. 511.

[42] Jones v. Cincinnati &c. R. Co., 89 Ala. 376, 8 So. 61, distinguishing Louisville &c. R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44. See also Missouri Pac. R. Co. v. Harper Bros., 201 Fed. 671. It has been held a question for the jury to determine whether the terms of a receipt or bill of lading, limiting liability to the carrier's own line, were fairly understood and assented to by the consignor. Ohio &c. R. Co. v. Emrich, 24 Ill. App. 245; Chicago &c. R. Co. v. Montfort, 60 Ill. 175. But this may be conclusively presumed in the absence of fraud or mistake where the shipper accepts and acts upon it. Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514. See also Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56; Hadd v. United States &c. R. Co., 52 Vt. 335, 36 Am. Rep. 757, 6 Am. & Eng. R. Cas. 443; Phifer v. Carolina Cent. R. Co., 89 N. Car. 311.

[43] Missouri Pac. R. Co. v. Wichita, &c. Co., 55 Kans. 525, 40 Pac. 899; Atchison &c. R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98. See also Schaeffer v. Philadelphia &c. R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. 884; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760 and notes; Gaines v. Union &c. Co., 28 Ohio St. 418. But compare Crum v. Yundt, 12 Ind. App. 308, 40 N. E. 79; Baltimore &c. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106, 1107.

shipment is made are partners, such a contract limiting the liability of each of its own line, and providing that it shall not be responsible for the negligence of any of the others, has been held invalid as against public policy.[44] In such a case it virtually amounts to a contract by the carrier against liability for its own negligence. So, where several railroad companies had formed a traffic association, and goods were shipped over their line under a bill of lading which provided that, in case of loss or damage, "that company alone shall be held answerable therefor in whose actual custody the same may be at the time of such loss, detriment or damage," it was held that this did not relieve the first carrier from liability for the refusal of one of its associates to receive the goods.[45] It was also held, in the same case, that, where unqualified receipts were given, containing no exemption from liability, and these were afterward cancelled and bills of lading issued in lieu thereof, containing an exemption from liability without any other change in the terms of the contract, such stipulation for exemption was not binding in the absence of anything to show some consideration therefor.

§ 2168 (1439). Rule where statute makes initial carrier liable for negligence of others.—The rule that a carrier may contract against extraterminal liability has been applied even where a statute provided that a common carrier receiving property "to be

[44] Milne v. Douglass, 13 Fed. 37; Merchants' &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Galveston &c. R. Co. v. Houston (Tex. Civ. App.), 40 S. W. 842; Gulf &c. R. Co. v. Wilson, 7 Tex. Civ. App. 128, 26 S. W. 131; Gulf &c. R. Co. v. Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302. See also Wilson v. Louisville &c. R. Co., 103 App. Div. 203, 92 N. Y. S. 1091; Rocky Mt. Mills v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682; Texas &c. R. Co. v. Pool, 52 Tex. Civ. App. 307, 114 S. W. 685; note in 31 L. R. A. (N. S.) 45-51. But see Weinberg v. Albemarle &c. R. Co., 91 N. Car. 31, 18 Am. & Eng. R. Cas. 597. And compare Phifer v. Carolina Cent. R. Co., 89 N. Car. 311, 45 Am. Rep. 687.

[45] Southard v. Minneapolis &c. R. Co., 60 Minn. 382, 62 N. W. 442, 619. But see Hot Springs R. Co. v. Trippe, 42 Ark. 465, 48 Am. Rep. 65; Crockett v. St. Louis &c. R. Co., 147 Mo. App. 347, 126 S. W. 243; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221.

transferred from one place to another within or without the state," or "issuing receipts or bills of lading in the state," should be liable for loss or injury to such property caused by its negligence or the negligence of any common carrier to which such property might be delivered or over whose line it might pass. It was held that the effect of the statute of which we have just given the substance was simply to prescribe a definite rule of evidence, substantially the same as the English rule, whereby a prima facie liability would be established in the absence of a specific contract against extraterminal liability.[46] In a more recent case, however, the same court modified some of the statements in the former decisions and held that, while a carrier could, under such statute, limit its contract of carriage to the terminus of its own route, it could not contract for a through shipment and at the same time exempt itself from liability on account of the negligence of the connecting carriers.[47] It was held that, even as applied to a contract for transportation beyond the limits of the state, the statute was not invalid as regulating or interfering with interstate commerce.[48] Other cases showing the rule under particular statutes are cited below.[49]

[46] Dimmitt v. Kansas City &c. R. Co., 103 Mo. 433, 15 S. W. 761. Followed in Nines v. St. Louis &c. R. Co., 107 Mo. 475, 18 S. W. 26; See also Chicago &c. R. Co. v. Church, 12 Ill. App. 17; Watkins v. St. Louis &c. R. Co., 44 Mo. App. 245; Miller Grain &c. Co. v. Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894; Ireland v. Mobile &c. R. Co., 20 Ky. L. 1586, 49 S. W. 188, 453.

[47] McCann v. Eddy, 133 Mo. 59, 33 S. W. 71. Compare Marshall &c. Grain Co. v. Kansas City &c. R. Co., 176 Mo. 480, 75 S. W. 638, 98 Am. St. 508.

[48] Citing Hart v. Chicago &c. R. Co., 69 Iowa 485, 29 N. W. 597; Solan v. Chicago, M. & St. P. R. Co., 95 Iowa 260, 63 N. W. 692, 58 Am. St. 430 (affirmed in 169 U. S. 133), 42 L. ed. 688; Bagg v. Wilmington &c. R. Co., 109 N. Car. 279, 14 S. E. 79. But see post § 2171; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257; Gamble-Robinson Com. Co. v. Union Pac. R. Co., 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915B, 89n, as to the rule in regard to interstate shipments since the Carmack amendment. Compare, however, Patton v. Texas &c. R. Co. (Tex.), 137 S. W. 721 (not liable for failure to notify connecting carrier of diversion of shipment at request of shipper).

[49] Falvey v. Georgia R., 76 Ga. 597, 2 Am. St. 58; Joseph v. Geor-

§ 2169 (1440). **Liability for deviation or failure to obey instructions.**—It is, in general, the duty of the initial carrier to obey the instructions of the shipper as to the route, mode of carriage, and the like,[50] and it should also transmit the instructions of the shipper to the connecting carrier.[51] Where the route and connecting carrier are not specified it may usually select them for itself,[52] but if they are specified it will become responsible as

gia R. Co., 88 Ga. 426, 14 S. E. 591; Chicago &c. R. Co. v. Church, 12 Ill. App. 17; King v. Macon &c. R. Co., 62 Barb. (N. Y.) 160; Burtis v. Buffalo &c. R. Co., 24 N. Y. 269; Root v. Great Western &c. R. Co., 45 N. Y. 524; Miller v. South Carolina R. Co., 33 S. Car. 359, 11 S. E. 1093, 9 L. R. A. 833; Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Gulf &c. R. Co. v. Adair, 4 Tex. App. (Civil Cases) 55, 14 S. W. 1076. See also notes in 31 L. R. A. (N. S.) 20, 53.

[50] Express Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457; Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Stewart v. Merchants' etc. Co., 47 Iowa 229, 29 Am. Rep. 476; Philadelphia &c. R. Co. v. Beck, 125 Pa. St. 620, 17 Atl. 505; Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659; Proctor v. Eastern R. Co., 105 Mass. 512; Davis v. Garrett, 6 Bing. 716; Sleat v. Fagg, 5 Barn. & Ald. 342. See also Illinois Cent. R. Co. v. Tronstine, 64 Miss. 834, 2 So. 255; Wright v. Northern &c. R. Co., 8 Phila. (Pa.) 19; Pankey v. Richmond &c. R. Co., 3 Inters. Com. 806; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756; Cleveland &c. R. Co. v. C. A. Potts Co., 33 Ind. App. 564, 575, 71 N. E. 685 (quoting text). See Cleveland &c. R. Co. v. Hayes, 181 Ind. 87, 103 N. E. 839, 102 N. E. 34, as to this and the effect of the amendment of June 8, 1910, to the Interstate Commerce Act.

[51] North v. Merchants' Transp. Co., 146 Mass. 315, 15 N. E. 779; Palmer v. Chicago &c. R. Co., 56 Conn. 137, 13 Atl. 818; Little Miami R. Co. v. Washburn, 22 Ohio St. 324; Pankey v. Richmond &c. R. Co., 3 Inters. Com. 33; ante, § 2160.

[52] Atchison T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Patten v. Union Pac. R. Co., 29 Fed. 590; Kentucky &c. Bridge Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289; Alabama &c. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18n; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Edwards v. American Exp. Co., 109 Maine 444, 84 Atl. 987, 42 L. R. A. (N. S.) 705; Chartrand v. Southern Ry., 85 S. Car. 477, 67 S. E. 741; Gulf &c. R. Co. v. Irvine (Tex. Civ. App.), 73 S. W. 540; Mattingly v. Pennsylvania Co., 2 Inters. Com. 806. It should, however, as a general rule select the ordinary route or one equally safe and cheap. Pankey v. Richmond &c. R. Co., 3

an insurer for unnecessary deviation, even though it had not contracted for a through shipment otherwise than as a forwarding agent,[53] or had expressly limited its liability as a common carrier to its own line, or the like.[54] There are, however, cases in which an emergency may arise which will justify a deviation.[55] But the burden of showing such an emergency has been held to rest upon the carrier.[56] If there is no emergency, but for some reason the connecting carrier cannot or will not receive the goods, it is generally the duty of the initial carrier to notify the shipper or owner and await instructions.[57] The consent of the parties interested

Inters. Com. 33; Wells, Fargo &c. Co. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Merchants' &c. Co. v. Kahn, 76 Ill. 520; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745. And to same effect are most of the cases cited in the first part of this note.

[53] Independence Mills Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Brown &c. Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961; Wilcox v. Parmelee, 3 Sandf. (N. Y.) 610; Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Goodrich v. Thompson, 44 N. Y. 324; Isaacson v. New York &c. R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Philadelphia &c. R. Co. v. Becks, 125 Pa. St. 620, 17 Atl. 505, 11 Am. St. 924; Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820. The text is cited to this effect in Weaver v. Southern Ry. Co., 135 Mo. App. 210, 115 S. W. 500. See also Bennett v. Missouri Pac. Ry. Co., 100 Kans. 537, 164 Pac. 1084, L. R. A. 1918A, 1061 and note; Texas &c. R. Co. v. Eastin, 100 Tex. 556, 102 S. W. 105.

[54] Dunseth v. Wade, 3 Ill. 285; Robinson v. Merchants' &c. Co., 45 Iowa 470; Merrick v. Webster, 3 Mich. 268; Maghee v. Camden &c. R. Co., 45 N. Y. 514, 6 Am. Rep. 124; Robertson v. National &c. Co., 17 N. Y. S. 459; Fatman v. Cincinnati &c. R. Co., 2 Disn. (Ohio) 248; Galveston &c. R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; Pecos River R. Co. v. Harrington (Tex. Civ. App.), 99 S. W. 1050, 1051 (citing text); Collins v. Bristol &c. R. Co., 11 Exch. 790. See also Chicago &c. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43; Brown &c. Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

[55] Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Regan v. Grand Trunk R. Co., 61 N. H. 579. See also International &c. R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, 87 Tex. 311.

[56] Le Sage v. Great Western R. Co., 1 Daly (N. Y.) 306; Ackley v. Kellogg, 8 Cow. (N. Y.) 223.

[57] Goodrich v. Thompson, 44 N. Y. 324; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54. Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Louisville &c. R. Co. v. Odill, 96

will, of course, justify the carrier in the deviation from the original route.[58] And it has been held that where there is nothing in the bill of lading or other final written contract specifying the route or restricting the right of the carrier to select its own agency or the route over which the goods are to be forwarded, parol evidence is inadmissible to show that the carrier agreed to forward them over a particular route at the time the bill of lading was executed.[59]

§ 2170 (1441). Actions on account of extraterminal defaults.— The English rule is that a contract for extraterminal liability having been expressly made with the initial carrier, or being applied, the shipper's only action for damages for default, no matter upon what line it occurs, is against such initial carrier.[60] This rule has been followed in this country only in Georgia,[61] the courts of all other states holding that the shipper may have his action against

Tenn. 61, 33 S. W. 611, 54 Am. St. 820. See also Levy v. Louisville &c. R. Co., 35 La. Ann. 615; Weaver v. Southern R. Co., 135 Mo. App. 210, 115 S. W. 500; Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Michigan Cent. R. Co. v. Mineral Springs &c. Co., 16 Wall. (U. S.) 318, 21 L. ed. 297. This was held to be necessary in a recent case where there was a strike on the route which had been selected by the shipper. Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390. But compare Railroad v. Odill. 96 Tenn. 61, 64, 33 S. W. 611, 54 Am. St. 820.

[58] Hedricks v. Steamship Morning Star, 18 La. Ann. 353. See also Best v. Great Northern Ry. Co., 159 Wis. 429, 150 N. W. 484. But see as to when acceptance of goods and payment of freight will not amount to a waiver. Brown &c. Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

[59] White v. Ashton, 51 N. Y. 280; Hinckley v. New York &c. R. Co., 56 N. Y. 429; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Indianapolis &c. R. Co. v. Remmy, 13 Ind. 518.

[60] For the reason that there is no privity of contract between connecting carriers and the shipper. Collins v. Bristol &c. R. Co., 11 Exch. 790; Coxon v. Great Western R. Co., 5 Hurl. & N. 274; Mytton v. Midland &c. Ry. Co., 4 Hurl. & N. 615; Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468. The text is cited in dissenting opinion in Elliott v. Chicago &c. Ry. Co., 35 S. Dak. 57, 150 N. W. 777, 782.

[61] Mosher v. Southern Ex. Co., 38 Ga. 37; Southern Ex. Co. v. Shea, 38 Ga. 519. The Georgia Code, § 2084, provides that where

the carrier in default,[62] or against the initial carrier where it has, expressly or impliedly, become liable as a common carrier for through carriage of the goods.[63] In some jurisdictions, as we

there are several connecting railroads under different companies, and goods are intended to be transported over more than one road, each company shall be responsible only to its own terminus, and until delivery to the connecting road, the last company which received the goods in good order being liable to the consignee for any damage thereto. In Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. 58, it was held that this statute applies only in the absence of an express or implied contract to carry to the destination, and the English rule was reannounced that a contract for extraterminal liability will be implied from the reception of goods for transportation to a point beyond the initial carrier's line. But see the Georgia case cited in the following note. So, there may possibly be some question as to this where the Carmack amendment, or the later amendment, applies. See principal and dissenting opinions in Elliott v. Chicago &c. Ry. Co., 35 S. Dak. 57, 150 S. W. 777. And there may be a few jurisdictions in which the rule is changed by local statute.

[62] Southern Ex. Co. v. Hess, 53 Ala. 19; Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Anchor Line v. Dater, 68 Ill. 369; Chicago &c. R. Co. v. Northern Line Packet Co., 70 Ill. 217; Aigen v. Boston &c. R. Co., 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; Halliday v. St. Louis &c. R., 74 Mo. 159, 41 Am. Rep. 309; Nashua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Conkey v. Milwaukee &c. R. Co., 31 Wis. 619, 11 Am. Rep. 630. See also Johnson v. East Tennessee &c. R. Co., 90 Ga. 810, 17 S. E. 121; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; McMillan v. Chicago &c. Ry. Co., 147 Iowa 596, 124 N. W. 1069; Tradwell v. Chicago &c. Ry. Co., 150 Wis. 259, 136 N. W. 794; Missouri &c. Ry. Co. v. Harris, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377, L. R. A. 1915E, 942. (In this case the connecting carrier was sued and an attorney's fee held properly recoverable under the statute where the payment was delayed over thirty days, notwithstanding the Carmack amendment.) See as to place of service and suit in Federal court, St. Louis &c. R. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. ed. 486, Ann. Cas. 1915B, 77n.

[63] Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Richardson v. The Charles P. Chouteau, 37 Fed. 532; Central R. &c. Co. v. Georgia &c. Co., 91 Ga. 389, 17 S. E. 904; Hill Mfg. Co. v. Boston &c. R. Co., 104 Mass. 122, 6 Am. Rep. 202; Davis v. Jacksonville &c.

have seen, the English rule is so far adopted as to make the initial carrier liable upon an implied contract for extraterminal liability where no such contract would be implied under what is known as the "American rule," but in none of the states, with the possible exception of Georgia, is the English rule adopted by the courts to the full extent of requiring the initial carrier alone to be sued, even where another carrier has been guilty of the default. So, as we have seen, there are cases in which there is a joint and several liability upon the ground that as to the plaintiff the connecting carriers are partners.

§ 2171. Carmack Amendment and later amendments.—The so-called Carmack Amendment [64] to the Interstate Commerce Law or Hepburn Act,[65] supersedes the local state laws and statutes,[66] which, as shown in preceding sections, were un-

Line, 126 Mo. 69, 28 S. W. 965; Wyman v. Chicago &c. R. Co., 4 Mo. App. 35; Hart v. Rensselaer &c. R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 49 Am. & Eng. R. Cas. 98; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602; Bradford v. South Carolina &c. R. Co., 7 Rich. L. (S. Car.) 201, 62 Am. Dec. 411; Noyes v. Rutland &c. R. Co., 27 Vt. 110; Planters Nat. Bank v. Adams Ex. Co., 93 U. S. 174, 23 L. ed. 872. This subject is further considered in the chapter on actions against carriers.

[64] 34 St. L. 594, Fed. Am. St. 1909 Supp. 273.

[65] 24 St. L. 379C, 104, 3 Fed. St. Ann. 850.

[66] Chicago &c. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. 323; Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n; Chicago &c. R. Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. ed. 328. Great Northern R. Co. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. ed. 703; Kansas City &c. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683; Boston &c. R. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 869, L. R. A. 1915B 450, Ann. Cas. 1915D, 593n; St. Louis &c. R. Co. v. Faulkner, 111 Ark. 430, 164 S. W. 763; Craner v. Southern R. Co., 13 Ga. App. 86, 78 S. E. 1014; Fry v. Southern Pac. R. Co., 247 Ill. 564, 93 N. E. 906; Louisville &c. R. Co. v. Miller, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819n. Many other recent decisions might be cited to the same effect, but the decisions of the Supreme Court of the United States above cited are of themselves enough to settle the question. But see for matters held not to be covered so as to supersede state law in the particular respect, Missouri &c. R. Co. v. Harris, 234 U. S. 412, 34 Sup.

certain and conflicting—on the subject covered by it, and makes some radical changes in the law as it prevailed in many jurisdictions, where the shipment is an interstate one. The "significant and dominating features" of the amendment are stated in a leading case as follows: "First: It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.' Second: Such initial carrier is made 'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it.' Third: It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.' Fourth: It affirmatively declares that 'no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.'"[67] And in another case it is said: "Reduced to its final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to a point in another, involving the use of a connecting carrier, for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to its own negligence."[68] As intimated in this quotation, and as held in other cases, the original Carmack Amendment did not apply to a shipment from a state to a foreign

Ct. 790, 58 L. ed. 1377, L. R. A. 1915E, 942n; Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019; Stukes v. Southern Express Co., 96 S. Car. 383, 80 S. E. 672; Uber v. Chicago &c. R. Co., 151 Wis. 431, 138 N. W. 57.

[67] Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, 263.

[68] Atlantic &c. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L. R. A. (N. S.) 17, 33, 34. See also Louisville &c. R. Co. v. Scott, 219 U. S. 209, 31 Sup. Ct. 171, 55 L. ed. 183; Gibson v. Little Rock &c. R. Co., 93 Ark. 439, 124 S. W. 1033; Blackmer &c. Co. v. Mobile &c. R. Co., 137 Mo. App. 479, 119 S. W. 1; Travis v. Wells, Fargo & Co. (N. J. L.), 74 Atl. 444; Missouri &c. R. Co. v. Stark Grain Co. (Tex. Civ. App.), 131 S. W. 410.

country;[69] but such amendment was broadened in this respect, and apparently changed in some other respects also by the amendment of March 4, 1915, which became effective according to its terms, ninety days after its passage.[70] This, in turn was

[69] Burke v. Gulf &c. Ry. Co., 147 N. Y. S. 794; Houston &c. R. Co. v. Suman, 63 Tex. Civ. App. 556, 134 S. W. 275; Best v. Great Northern Ry. Co., 159 Wis. 429, 150 N. W. 484.

[70] Fed. St. Am. Pamphlet Supp. No. 2, p. 30; Barnes' Fed. Code § 7976. The Carmack amendment mentioned only transportation "from a point in one state to a point in another state." This last amendment starts by making the same provision as the Carmack amendment, but includes in that provision such transportation as is mentioned in the new provision, as follows: "And any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state, territory, or the District of Columbia to a point in another state or territory, or from a point in a state or territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provid-

modified by the second Cummins Amendment, approved August 9, 1916, striking out the proviso in regard to the valuation and extent of liability in case of goods hidden from view by wrapping or the like and substituting a proviso to the effect that the provision for full liability for loss or injury, and against any limitation thereof, shall not apply to baggage carried or passenger trains, nor to property, except ordinary live stock, received for transportation concerning which the Interstate Commerce Commission has fixed or affirmatively authorized a rate dependent upon the value declared in writing or so agreed on as the released value, in which case the value declared or released shall have no other effect than to limit liability and recovery to that amount and shall not, so far as relates to value, be held to be a violation of Section 10 of the Interstate Commerce Act. The Carmack Amendment does not of itself make the initial carrier absolutely liable as an insurer for loss or injury which neither it nor the connecting carrier could avoid.[71] Nor does it make the initial carrier

ed further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." These provisions, except that saving any remedy or right of action which the holder of a receipt or bill of lading has under existing law, are new at least in terms.

[71] Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n; Cleveland &c. R. Co. v. Hayes, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; Bernard v. Adams Exp. Co., 205 Mass. 254, 91 N. E. 325, 28 L. R. A. (N. S.) 293n, 18 Ann. Cas. 351; St. Louis &c. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406. But it is liable under such amendment no matter whether the route connections are designated by it or by the shipper. Norfolk &c. R. Co. v. Dixie Tobacco Co., 228 U. S. 593, 33 Sup. Ct. 600, 57 L. ed. 980. And it has been held liable as for an interstate shipment where the shipment was diverted or stopped by order of the consignee within the state. Yanski v. Chicago &c. R. Co., 181 Ill. App. 565. And where consignor controls and rightfully changes destination his reconsignment does not break

liable for loss or damage to goods after the liability of the connecting carrier has ceased and it has become a warehouseman.[72] And it has been held that the liability of the carrier may be limited by special contract so long as its is reasonable and does not exempt the carrier from responsibility for negligence;[73] and that this insures to the benefit of the connecting carrier.[74] But where

the connection and the new destination is regarded as the original one in determining liability of initial carrier under this Act. Produce Trading Co. v. Norfolk So. R. Co., 178 N. Car. 175, 100 S. E. 316. But compare Porter v. Lehigh Valley R. Co., 184 N. Y. S. 870. As to whether the amendment applies so as to make the initial carrier liable for merely delay compare Gulf &c. R. Co. v. Nelson (Tex.), 139 S. W. 81 (holding it does not) with Norfolk Truckers' Exch. v. Norfolk Southern R. Co., 116 Va. 466, 82 S. E. 92 (holding it does). See also Patton v. Texas &c. R. Co. (Tex.), 137 S. W. 721.

[72] Louisville &c. R. Co. v. Brewer, 183 Ala. 172, 62 So. 698; Marcus v. Chicago &c. R. Co., 167 Ill. App. 638; Hogan Mill. Co. v. Union Pac. R. Co., 91 Kans. 783, 139 Pac. 397; Adams Seed Co. v. Chicago &c. R. Co., 181 Iowa 1052, 165 N. W. 367, L. R. A. 1918B, 622; Norfolk &c. R. Co. v. Stuart's Draft Milling Co., 109 Va. 184, 63 S. E. 415. But compare Nashville &c. R. Co. v. Dreyfuss &c. Co., 150 Ky. 333, 150 S. W. 321.

[73] Missouri &c. R. Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; Cranor v. Southern R. Co., 13 Ga. App. 86, 78 S. E. 1014; St. Louis &c. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406. See also Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n; Chicago &c. R. Co. v. Cramer, 232 U. S. 490, 33 Sup. Ct. 383, 58 L. ed. 697; Ray v. Missouri &c. R. Co., 90 Kans. 244, 133 Pac. 847, Ann. Cas. 1915B, 818n; Cook v. Northern Pac. Ry. Co., 32 N. Dak. 340, 155 N. W. 867. But see the amendment of March 4, 1915, ante n. 70, providing that the initial carrier shall be liable for full actual loss, damage or injury caused by it or its connecting carrier, notwithstanding any limitation of liability or agreement as to value, and that a shorter period than ninety (90) days for giving notice, four months, for filing claims, and two years for instituting suit shall not be fixed by the carrier, and that where the "loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

[74] Kansas City &c. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 639, 57 L. ed. 683; Harrison Granite Co. v. Grand Trunk &c. R. Co., 175 Mich. 144, 141 N. W. 642; Atchison &c. R. Co. v. Ward (Tex.), 159 S. W. 375.

there is a liability the initial carrier can not limit it to loss or damage occurring on its own line.[75] The Transportation Act, 1920, has also made some amendments by inserting a proviso that if the loss, damage or injury occurs while the property is in custody of a carrier by water its liability shall be determined under the law and regulations applicable to transportation by water and that of the initial carrier shall be the same; and by adding to the proviso as to notice and filing of claims and the institution of suits, a provision that the period for the institution of suits shall be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice.[76]

[75] Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L. R. A. (N. S.) 7n; Norfolk &c. R. Co. v. Dixie Tobacco Co., 228 U. S. 593, 33 Sup. Ct. 09, 57 L. ed. 980; Central of Georgia R. Co. v. Sims, 169 Ala. 295, 53 So. 826; Fry v. Southern Pac. Co., 247 Ill. 564, 93 N. E. 906; Pittsburgh &c. R. Co. v. Knox, 177 Ind. 344, 98 N. E. 295; Perkett v. Manistee &c. R. Co., 175 Mich. 253, 141 N. W. 607; Dodge v. Chicago &c. R. Co., 111 Minn. 123, 126 N. W. 627, 137 Am. St. 542; Texas Cent. Ry. Co. v. Hico Oil Mill (Tex.), 132 S. W. 381. It is expressly provided, however, that the initial carrier may recover from the carrier in fault the amount the former has been compelled to pay on that account. As to jurisdiction of state courts and whether only the initial carrier, or either all of the carriers can be sued, see Galveston &c. R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 57 L. ed. 516; Adams v. Chicago &c. R. Co., 210 Fed. 362; Walker v. St. Louis &c. R. Co., 162 Mo. App. 374, 142 S. W. 729; Otrick v. St. Louis &c. R. Co., 154 Mo. App. 420, 134 S. W. 665; Elliott v. Chicago &c. Ry. Co., 35 S. Dak. 57, 150 N. W. 777.

[76] For Act of 1916 see U. S. Comp. St. 1918, § 8604a; Barnes' Fed. Code, § 7976, and for Transportation Act, 1920, see Barnes' Fed. Code Suppl. 1921, § 7976, and Fed. Rep. (vol. 262) for April 1, 1920. See also as to carrier by water, Florida Cotton Oil Co. v. Clyde S. S. Co. (Mass.), 125 N. E. 855.

CHAPTER LXVIII

CONNECTING CARRIERS

Sec.
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§ 2180 (1442). **Definition.**—"A connecting carrier," according to the definition quoted by Hutchinson[1] from a Missouri case,[2] "is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them farther." But it has been held that a railroad company which receives loaded cars from another company, over whose line they have been transported to its own, and transfers them by means of a switch engine over a portion

[1] Hutchinson Carriers (3d ed. § 247).

[2] Nanson v. Jacob, 12 Mo. App. 125, since affirmed in 93 Mo. 331, 6 S. W. 246, 3 Am. St. 531.

of its own track to their destination, receiving compensation therefor, from the former company, is a connecting carrier, and liable as a common carrier for the loss of the same by fire while in its possession as such, no matter how short the distance may be.[3] And the term "is sometimes used to indicate any one of the several carriers whose lines together constitute the entire route." It is usually the duty of the first carrier to deliver the goods to the connecting carrier, and of one connecting carrier to deliver them to the next, and the transferring company is, ordinarily, the agent of the company whose duty it is to deliver the goods to the next carrier.[5] It has been held that a transfer company is not, when so employed by one carrier to deliver goods to the next one, a connecting carrier,[6] nor, it seems, is a cartage company, or the like, which is employed by the last carrier, or by the consignee, to remove the goods and deliver them to the consignee.[7]

§ 2181 (1443). Commencement of connecting carrier's liability.—The connecting carrier's liability begins with the actual de-

[3] Missouri Pac. R. Co. v. Wichita &c. Co., 55 Kans. 525, 40 Pac. 899. In this case the court said: "The distance over which frieght is hauled, whether in car-load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car-load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train." But see Missouri Pac. R. Co. v. Young, 25 Nebr. 651, 41 N. W. 646; Western &c. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916.

[5] Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Missouri Pac. R. Co. v. Young, 25 Nebr. 651, 41 N. W. 646; Hooper v. Chicago &c. R. Co., 27 Wis. 81, 9 Am. Rep. 439. See also Hendrix v. Railroad, 107 Mo. App. 127, 80 S. W. 970 (shipper not liable for the extra expense).

[6] See cases cited in last preceding note, also Western &c. R. Co. v. Exposition &c., 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102, 35 Am. & Eng. R. Cas. 602; Texas &c. R. Co. v. Scoggin, 40 Tex. Civ. App. 526, 90 S. W. 521.

[7] Roach v. Canadian Pac. R. Co., 1 Manitoba 158; Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. 531. See also Ringwalt v. Wabash R. Co., 45 Nebr. 760, 64 N. W. 219; International &c. R. Co. v. Bingham, 40 Tex. Civ. App. 469, 89 S. W. 1113; Texas &c. R. Co. v. Scoggin, 40 Tex. Civ. App. 526, 90 S. W.

livery to it,[8] or with such notification as, under the usages of business, constitutes a constructive delivery.[9] It is not rendered liable by the fact that the preceding carrier has unloaded the goods and stored them in a warehouse.[10] So, where a part of a

521 (local belt railway); Willett v. Southern R., 66 S. Car. 477, 45 S. E. 93 (holding a local express company a connecting carrier), and see Jackson Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. 432.

[8] Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 697; Petersen v. Case, 21 Fed. 885, 18 Am. & Eng. R. Cas. 578; Alabama &c. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 So. 356; Reynolds v. Boston &c. R. Co., 121 Mass. 291; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 2 L. R. A. 102, 18 Am. & Eng. R. Cas. 574; Lesinsky v. Great W. D. Co., 10 Mo. App. 134; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, note; Regan v. Grand Trunk R. Co., 61 N. H. 579; Miller v. Steam &c. Co., 10 N. Y. 431; Goold v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398; McKay v. New York Cent. R. Co., 50 Hun 563, 3 N. Y. S. 708; Kentucky &c. Ins. Co. v. Western &c. Railroad, 8 Baxt. (Tenn.) 268.

[9] Sprague v. New York Cent. R. Co., 52 N. Y. 637; Dunn v. Hannibal &c. R. Co., 68 Mo. 268; Selma &c. R. Co. v. Butts, 42 Ala. 385, 94 Am. Dec. 694. It has been held that constructive delivery is good only as between the carriers, and that the shipper may look only to the carrier who has actual possession. Goold v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398; Conkey v. Milwaukee &c. R. Co., 31 Wis. 619, 11 Am. Rep. 630, overruling Wood v. Milwaukee &c. R. Co., 27 Wis. 541, 9 Am. Rep. 465; McDonald v. Western R. Corp., 34 N. Y. 497; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 218, 54 Am. Rep. 367. But see Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Converse v. Norwich &c. Trans. Co., 33 Conn. 166; Pratt v. Railroad Co., 95 U. S. 43, 24 L. ed. 336; Mills v. Michigan &c. R. Co., 45 N. Y. 622, 6 Am. Rep. 152. It has been held, however, that the owner may recover from the carrier to whom a constructive delivery has been made. Aetna Ins. Co. v. Wheeler, 49 N. Y. 616. See ante, § 2124, as to what constitutes a sufficient delivery to a connecting carrier.

[10] Ayers v. Western R. Corp., 14 Blatchf. (U. S.) 9; Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; West Trans. Co. v. Newall, 24 Ill. 466, 76 Am. Dec. 760; Merchants' Desp. Co. v. Kahn, 76 Ill. 520; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Irish v. Milwaukee &c. R. Co., 19 Minn. 376, 18 Am. Rep. 340; Lesinsky v. Great W. D., 10 Mo. App. 134; Regan v. Grand Trunk R. Co., 61 N. H. 579; McKay v. New York &c. R. Co., 50 Hun (N. Y.) 563; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75 and note; Michaels v. New York &c. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; McDonald v. Western R. Co., 34 N. Y. 497; Root

lot of goods had been unloaded from a steamboat and placed in the car of a connecting carrier, and the rest of the articles had been pointed out and were ready to be taken from the boat, it was held that there was no complete delivery of the latter, either actual or constructive, and that the railroad company was not liable for those destroyed by fire while still upon the steamboat.[11] But evidence that fourteen boxes of goods were delivered to the initial carrier, and sealed in a car, and that such car, still sealed, was delivered to the connecting carrier, has been held sufficient to charge the latter with the receipt of that number of boxes of goods.[12] Considering the fact, however, that freight cars of one road are constantly being used by others, mere proof that the initial carrier delivered goods into the cars of a connecting car-

v. Great Western R. Co., 45 N. Y. 524; Mills v. Michigan &c. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Condict v. Grand Trunk E. Co., 54 N. Y. 500; Whitworth v. Erie &c. R. Co., 87 N. Y. 413; Louisville &c. R. v. Campbell, 7 Heisk. (Tenn.) 253; Brintnall v. Saratoga &c. R. Co., 32 Vt. 665.

[11] Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742. See also Texas &c. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. ed. 362. Under ordinary conditions, a common carrier is bound to accept freight tendered it, yet an impending flood of such a character as to fall properly within the legal definition of an act of God, and which threatened with inundation defendant's railroad tracks, has been held a sufficient excuse to justify defendant in refusing plaintiff's shipment. And it is also held in this same case that evidence that cars containing plaintiff's property were placed on defendant railroad's connecting track, the usual place of delivery of freight destined for it as connecting carrier, under an arrangement with other roads that freight so placed would be accepted for further transportation, did not amount to an acceptance until defendant took actual charge of the property, accepted the bill of lading, or performed some other acts amounting in law to an acceptance; and that as it was justified in refusing to accept plaintiff's freight contained in cars placed on defendant's track, it was under no obligation to push such cars at plaintiff's request to a platform to be unloaded, and hence was not liable for a loss of the shipment by reason of a flood inundating the tracks, though by complying with such request the loss might have been avoided. Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983.

[12] Newport News &c. R. Co. v. Mendell, 17 Ky. L. 1400, 34 S. W. 1081. See also Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790, 18 Am. & Eng. R. Cas. 568.

rier has been held insufficient to establish a complete delivery and notice to it that they were to be carried by it over its own road.[13]

§ 2182 (1443a). **Duty of connecting carrier to receive goods from predecessor.**—A common carrier rests under the same obligation to receive goods for transportation from another carrier that it does from any other shipper. It is its duty to accept goods tendered by a preceding carrier for shipment over its line, and to transfer and deliver such goods to the consignee, if on its line, or, being an intermediate carrier, to transfer and deliver the goods to the next connecting line in good order, with necessary instructions, sufficiently explicit to inform the next carrier of their ultimate destination.[14] The goods must be accepted within a reasonable time. The connecting carrier will not be permitted to delay his acceptance beyond reasonable limits and thereby prolong the liability of the initial carrier.[15] A connecting carrier has been held liable for the entire damage to a shipment where it refused, without a valid reason, to accept a shipment from a predecessor, though the other line might have been guilty of negligence rendering it also liable.[16] But it is the duty of the initial carrier to tender the goods in a fit condition for further transportation.[17] The connecting carrier, in case of tender of goods in a damaged condition, may qualify its acceptance of them; and a regulation of a railroad company that it will not receive goods that have been damaged while in the hands of other lines, unless it is indemnified against liability, will be upheld

[13] Patten v. Union Pac. R. Co., 29 Fed. 590. See also Merchants' Dispatch &c. Co. v. Hatley, 14 Can. Sup. Ct. 572.

[14] Hall v. Wabash &c. R. Co., 80 Mo. App. 463, 2 Mo. App. R. 619; Ft. Worth &c. R. Co. v. Masterson, 95 Tex. 262, 66 S. W. 833 (a void state quarantine law not an excuse). See also Berger v. Chicago &c. Ry. Co., 159 Wis. 256, 150 N. W. 496, 499 (citing text). But compare State Public Utilities Co. v. Pittsburgh &c. R. Co., 290 Ill. 580, 125 N. E. 495.

[15] Wood v. Milwaukee &c. R. Co., 27 Wis. 541, 9 Am. Rep. 465.

[16] Gulf &c. R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777.

[17] Buston v. Pennsylvania R. Co., 116 Fed. 235.

as a reasonable and proper precaution.[18] The fact that a connecting carrier demands an excessive indemnity will not relieve the initial carrier from the duty of tendering the proper indemnity.[19] Where a connecting carrier refuses the goods it is the duty of the carrier whose tender is refused to store the goods and notify the owner of the fact, and ask further shipping orders.[20] During this period the carrier's relation to the goods will be that of a warehouseman.[21] It has been held that the consignee of goods injured prior to the tender to a connecting carrier, and with notice that they cannot be delivered at their destination by reason of a refusal of the connecting carrier to receive them, is not obliged to accept the goods at the transhipping point.[22]

§ 2183 (1444). **Liability for defaults of the initial or of other connecting carriers.**—A connecting carrier can not, as a rule, be held for the default of the initial, or of other connecting carriers, in the absence of a partnership, express or implied.[23] Thus,

[18] Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86, 21 S. W. 426.

[19] Gulf &c. R. Co. v. A. B. Frank Co. (Tex. Civ. App.), 48 S. W. 210, 212.

[20] Buston v. Pennsylvania R. Co., 119 Fed. 808; Louisville &c. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988; Lesinsky v. Great Western Dispatch, 10 Mo. App. 134; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Louisville &c. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820; Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. 856; Wood v. Milwaukee &c. R. Co., 27 Wis. 541, 9 Am. Rep. 405.

[21] Larimore v. Chicago &c. R. Co., 65 Mo. App. 167.

[22] Gulf &c. R. Co. v. A. B. Frank (Tex. Civ. App.), 48 S. W. 210.

[23] Montgomery &c. R. Co. v. Moore, 51 Ala. 394; Knott v. Raleigh &c. R. Co., 98 N. Car. 73, 3 S. E. 735, 2 Am. St. 321; Hill v. Burlington &c. R. Co., 60 Iowa 196; Lowenburg v. Jones, 56 Miss. 688, 31 Am. Rep. 379; Wehmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546; Chesapeake &c. R. Co. v. F. W. Stock & Sons, 104 Va. 97, 51 S. E. 161, 163, 164 (quoting text). See also St. Louis Ins. Co. v. St. Louis &c. R. Co., 104 U. S. 146, 26 L. ed. 679; Rocky Mount. Mills v. Railroad Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682; Eckles v. Railway Co., 112 Mo. App. 240, 87 S. W. 99; Berry &c. Co. v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714 (and a local statute does not apply to an interstate shipment). But see authorities cited in last note to this section tion and also Atlantic &c. R. Co.

where tobacco was damaged while in the hands of a third connecting carrier, it was held that the carrier which received it from the initial carrier was not liable therefor, although the receipt given by the initial company stated that the company to which it should deliver the tobacco should be regarded as the agent of the owner.[24] So, where goods were lost by a prior carrier, it was held that the last carrier could not be held liable for the loss.[25] But sometimes, because of the relation of principal and agent, and, more frequently, because of a partnership relation existing between them, one connecting carrier has been held liable for the default of another. Such partnerships for joint carriage may be formed,[26] and when existing, either expressly or impliedly, any or all of the members may be held for the defaults of each.[27]

v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 165, 55 L. ed. 167, 31 L. R. A. (N. S.) 7n; Chicago &c. R. Co. v. Marshall, 38 Ind. App. 217, 75 N. E. 973; Galveston &c. R. Co. v. Crow (Tex. Civ. App.), 117 S. W. 170.

[24] Knott v. Raleigh &c. R. Co., 98 N. Car. 73, 3 S. E. 735, 2 Am. St. 321.

[25] Lowenburg v. Jones, 56 Miss. 688, 31 Am. Rep. 379. So, where the last carrier shows that the goods were damaged to the same extent when received by it. Gulf &c. R. Co. v. Malone (Tex.), 25 S. W. 1077. So, where there is no evidence that the goods were ever delivered to the last carrier. Chicago &c. R. Co. v. Goldman, 46 Ill. App. 625. See also Church v. Atchison &c. R. Co., 1 Okla. 44, 29 Pac. 530. Where, in an action for loss of goods both defendants, connecting carriers over whose lines the goods were transported, denied the loss, each claiming that, if a loss occurred, the other was to blame for it, and there was evidence that after the goods were delivered to the initial carrier the car was sealed, and the car with the seals unbroken was delivered at the ultimate destination, it was held that the question as to whether the loss, if any, occurred on the line of the initial or of the connecting carrier was for the jury. International &c. R. Co. v. Bingham, 40 Tex. Civ. App. 469, 89 S. W. 1113.

[26] Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679; Hot Springs R. Co. v. Trippe, 42 Ark. 465, 48 Am. Rep. 65; Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742; Aigen v. Boston &c. R. Co., 132 Mass. 423; Block v. Fitchburg &c. R. Co., 139 Mass. 308, 1 N. E. 348; Barter v. Wheeler, 49 N. H. 9, 2 Am. Rep. 165; Wylde v. Northern R. Co., 53 N. Y. 156; Swift v. Pacific &c. Steamship Co., 106 N. Y. 206, 12 N. E. 583.

[27] Cobb v. Abbot, 14 Pick. (Mass.) 289; New Orleans &c. R. Co. v. Lamkin, 78 Miss. 502, 30 So. 47; Bostwick v. Champion, 11 Wend. (N. Y.) 571; Champion v.

§ 2184 (1445). Liability as partner—What constitutes partnership.—Partnership liability of connecting carriers to third persons may exist without liability to each other.[28] "Where car-

Bostwick, 18 Wend. (N. Y.) 175; 31 Am. Dec. 376; Carter v. Peck, 4 Sneed (Tenn.) 203; Atchison &c. R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Rocky Mount. Mills Co. v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682; Weyland v. Elkins, Holt N. P. 227; Waland v. Elkins, 1 Starkie 272; Laugher v. Pointer, 5 B. & C. 547; Fremont v. Coupland, 2 Bing. 170. Compare also Wabash R. Co. v. Priddy, 179 Ind. 483, 499, 101 N. E. 724, 730 (citing this section and the next following section). And it is held that where a connecting carrier receives a shipment from the initial carrier and undertakes to carry the shipment to its destination, such connecting carrier impliedly makes itself subject to the provisions of the contract between the shipper and the initial carrier and becomes liable to the shipper for its own negligent acts and may be sued by him therefor. Elliott v. Chicago &c. Ry. Co., 35 S. Dak. 57, 150 N. W. 777 (also holding that the Carmack amendment does not change this rule and distinguishing or attempting to distinguish, Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n). But see as to English rule, Bristol R. &c. Co. v. Collins, 7 H. L. Cas. 194. The connecting carrier should usually inform itself of the contract under which the goods are shipped. Alcorn v. Adams Exp. Co., 148 Ky. 352, 146 S. W. 747, 52 L. R. A. (N. S.) 858n.

[28] Champion v. Bostwick, 11 Wend. (N. Y.) 571, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Pattison v. Blanchard, 5 N. Y. 186; Block v. Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Hill Mfg. Co. v. Boston &c. R. Co., 104 Mass. 122, 6 Am. Rep. 202; Wyman v. Chicago &c. R. Co., 4 Mo. App. 35. See also Swift v. Pacific Mail &c. Co., 106 N. Y. 206, 12 N. E. 583; Felder v. Columbia &c. R. Co., 21 S. Car. 35, 53 Am. Rep. 656; Harris v. Cheshire R. Co. (R. I.), 16 Atl. 512; Gulf &c. R. Co. v. Edloff (Tex. Civ. App.), 34 S. W. 410, 35 S. W. 144. As to conditions from which a partnership will be implied, see Cincinnati &c. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Harp v. The Grand Era, 1 Woods (U. S. C. C.) 184; Railroad Co. v. Anoka Nat. Bank, 108 Fed. 482; Hood v. New York &c. R. Co., 22 Conn. 1; Croft v. Baltimore &c. R. Co., 1 McArthur (D. C.) 492; Skinner v. Hall, 60 Maine 477; Baltimore &c. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Judson v. Western R. Co., 4 Allen (Mass.) 520, 81 Am. Dec. 718; Lowell &c. Co. v. Sargent, 8 Allen (Mass.) 189; Darling v. Boston &c. R. Co., 11 Allen (Mass.) 295; Cobb v. Abbott, 14 Pick. (Mass.) 289; Fitchburg &c. R. Co. v. Hanna, 72 Mass. 539, 66 Am. Dec. 427; Burroughs v. Norwich &c. R. Co., 100 Mass. 26; Washburn Manfg. Co. v. Providence &c. R. Co., 113 Mass.

riers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any of the expenses of the business, they become jointly liable as partners to third persons."[29] But "where the agreement is that each shall bear the expenses of his own route, and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither inter se nor as to third persons, and incur no joint liability."[30] Nor does the

490; Hartan v. Eastern R. Co., 114 Mass. 44; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Nashua &c. Co. v. Worcester &c. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Barter v. Wheeler, 49 N. H. 9, 16 Am. Rep. 434; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1 and note; Ricketts v. Baltimore &c. R. Co., 4 Lans. (N. Y.) 446; Slocum v. Fairchild, 7 Hill (N. Y.) 292; Fairchild v. Slocum, 19 Wend. (N. Y.) 329; Hempstead v. New York &c. R. Co., 28 Barb. (N. Y.) 485; Straiton v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 184; Milnor v. N. Y. &c. R. Co., 53 N. Y. 363; Bowman v. Hilton, 11 Ohio 303; Wilson v. Chesapeake &c. Railroad, 21 Grat. (Va.) 654.

[29] Hutchinson Carriers (3d ed.), § 263; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Bostwick v. Champion, 11 Wend. (N. Y.) 571; Hart v. Rensselaer &c. R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Peterson v. Chicago &c. R. Co., 80 Iowa 92, 45 N. W. 573. See also Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Nashua &c. Co. v. Worcester &c. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Cincinnati &c. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Swift v. Pacific &c. Co., 106 N. Y. 206, 12 N. E. 583; Bradford v. South Carolina R. Co., 7 Rich. L. (S. Car.) 201, 62 Am. Dec. 411; Coates v. United States Exp. Co., 45 Mo. 238; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184.

[30] Milne v. Douglass, 4 McCrary (U. S.) 368; Citizens' Insurance Co. v. Kountz Line, 4 Woods (U. S.) 268; Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679; Deming v. Norfolk &c. R. Co., 21 Fed. 25; Ellsworth v. Tartt, 26 Ala. 733, 62 Am. Dec. 749; Montgomery &c. R. Co. v. Moore, 51 Ala. 394; Hot Springs &c. R. Co. v. Trippe, 42 Ark. 465, 48 Am. Rep. 65; Converse v. Norwich &c. T. Co., 33 Conn. 166; Irvin v. Nashville &c. R. Co., 92 Ill. 103, 34 Am. Rep. 116; Peterson v. Chicago &c. R. Co., 80 Iowa 92, 45 N. W. 573; Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Pattison v. Blanchard, 5 N. Y. 186; Swift v. Pacific &c. Steamship Co., 106 N. Y. 206, 12 N. E. 583; Hutchinson Carriers (3d ed.) § 263. See also Washington v. Raleigh &c. R. Co., 101 N. Car. 239, 7 S. E. 789, 1 L. R. A. 830; Borroughs v. Norwich &c. R. Co., 100 Mass. 26; Fremont &c.

establishment by two or more carriers of joint or through rates make them joint carriers or one of them liable for the default of another.[31] But in an action for delay in delivery of freight, to be transported from one specified place to another over one road, and from the latter place to the final destination over another road, evidence that the two companies had the same freight agent at the connecting point, and the same freight dispatcher and other employes, and that the entire route from the point of original shipment to the final destination was under the supervision of a common traveling freight agent, was held sufficient to authorize a finding of a partnership arrangement between the two companies, making them liable as partners.[32]

. § 2185 (1446). **Effect of initial carrier's contract on connecting carriers.**—If a connecting railroad company is designated as

R. Co. v. Waters, 50 Nebr. 592, 70 N. W. 225; Miller v. Texas &c. R. Co., 83 Tex. 518, 18 S. W. 954. But compare New Orleans &c. R. Co. v. Lamkin, 78 Miss. 502, 37 So. 47; Central Am. S. S. Co. v. Mobile &c. R. Co., 144 Mo. App. 43, 128 S. W. 822; Missouri &c. R. Co. v. Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. 437.

[31] Wehrmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546; Fort Worth &c. R. Co. v. Johnson, 5 Tex. Civ. App. 24, 23 S. W. 827; Summer v. Walker, 30 Fed. 261; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827. See also Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. ed. 176; Southern Exp. Co. v. Saks, 160 Ala. 621, 49 So. 392; Railroad Co. v. Mulford, 162 Ill. 522, 44 N. E. 861. 35 L. R. A. 599; Carter v. Chicago &c. R. Co., 146 Iowa 201, 125 N. W. 94; Gass v. New York &c. R. Co., 99 Mass. 220, 96 Am. Dec. 742; Simmons Hardware Co. v. St. Louis &c. R. Co., 140 Mo. App. 130, 120 S. W. 663; Crockett v. St. Louis &c. R. Co., 147 Mo. App. 347, 126 S. W. 243; Wilson v. Louisville &c. R. Co., 103 App. Div. 203, 92 N. Y. S. 1091; Gulf &c. R. Co. v. Baird, 75 Tex. 256, 12 S. W. 530; Houston &c. R. Co. v. Groves, 48 Tex. Civ. App. 45, 106 S. W. 416; Chesapeake &c. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161. But compare Burke v. Concord R. Co., 61 N. H. 160; Harp v. The Grand Era, 1 Woods (U. S.) 184; Texas &c. R. Co. v. Parrish, 1 Tex. App. (Civil Cas.) 529; Wyman v. Chicago &c. R. Co., 4 Mo. App. 35; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900. 4 L. R. A. 545; Richardson v. The Charles P. Chouteau, 37 Fed. 532.

[32] Illinois Cent. R. Co. v. Jones, 87 Miss. 489, 39 So. 493. But compare Goehrend v. Perre Marquette R. Co., 146 Mich. 497, 109 N. W. 849. And see McGinn v. Oregon &c. R. &c. Co., 265 Fed. 81.

such in the initial carrier's bill of lading, or if the bill provides that all stipulations shall enure to the benefit of all the carriers, then, having accepted the goods thereunder without any separate agreement, it becomes virtually a party to the contract, bound by the undertakings therein and benefited by the limitations.[33] If, however, the connecting carriers are not designated, but are left to the initial carrier's selection, and there is no provision that the stipulations shall enure to the benefit of any other carrier, it is generally held that the connecting carrier may not claim the benefit of the original contract, and when it accepts the goods it does so under the law.[34] So, where the connecting carrier, on

[33] Railroad Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724; Fairbanks & Co. v. Cincinnati &c. R. Co., 66 Fed. 471; Western R. Co. v. Harwell, 97 Ala. 341, 11 So. 781; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Lake Shore &c. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 604 (citing text); United States Ex. Co. v. Harris, 51 Ind. 127; Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315; Kiff v. Atchison &c. R. Co., 32 Kans. 263, 4 Pac. 401; Morse v. Canadian Pac. R. Co., 97 Maine 77, 53 Atl. 874; Halliday v. St. Louis &c. R. Co., 74 Mo. 159, 41 Am. Rep. 309; Maghee v. Camden &c. R. Co., 45 N. Y. 514, 6 Am. Rep. 125; Lamb v. Camden &c. R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Whitworth v. Railroad Co., 87 N. Y. 413; Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 452, 63 Am. St. 856 (quoting text); Berger v. Chicago &c. Ry. Co., 159 Wis. 256, 150 N. W. 496, 500 (quoting text). See also Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; Hall v. Northeastern R. Co., L. R. 10 Q. B. 437.

[34] Central R. &c. Co. v. Bridger, 94 Ga. 471, 20 S. E. 349; Merchants' &c. Co. v. Bolles, 80 Ill. 473; Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. 315, 7 L. R. A. 214. Bancroft v. Merchants' &c. Co., 47 Iowa 262, 29 Am. Rep. 482; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Camden &c. R. Co. v. Forsyth, 61 Pa. St. 81; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40; Martin v. American Exp. Co., 19 Wis. 336; Crawford v. Great Western R. Co., 18 U. C. C. P. 510. But see Western R. Co. v. Harwell, 97 Ala. 341, 11 So. 781. See also note Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228, 242. But compare Elliott v. Chicago &c. Ry. Co., 35 S. Dak. 57, 150 N. W. 777. As to when initial carrier has no implied authority to bind shipper by contract limiting liability of connecting carriers, see Adams Exp. Co. v. Byers, 177 Ind. 33, 95 N. E. 513; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L.

receiving the goods, gave a receipt containing different provisions, it was held that it thereby lost the right to avail itself of provisions for its benefit in the receipt given by the first carrier.[35] And it has also been held that a connecting carrier cannot be considered as ratifying the original contract where, in receiving and transporting the goods, it merely does what a valid statute requires it to do.[36]

§ 2186 (1447). **Liability for defaults of common agent.**—The employment by connecting carriers of a common agent may render them jointly liable for his, but not for each other's defaults.[37] But such an agent, having authority, may sometimes, by contract to carry over all the lines, render one liable for the default of another, at least where the enterprise is joint.[38] We think the

R. A. 433; Benson v. Oregon &c. R. Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052, 19 Ann. Cas. 803.

[35] Browning v. Goodrich &c. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. 414. See also Gordon v. Great Western R. Co., 25 U. C. C. P. 488. And see held not liable where it gave a receipt limiting its liability. Hinkley v. New York &c. R. Co., 3 T. & C. (N. Y.) 281, affirmed in 60 N. Y. 644; Chicago &c. R. Co. v. Northern &c. Co., 70 Ill. 217. But under the Carmack Amendment for the purpose of fixing the liability the several carriers must be treated as one system, a second bill of lading by the connecting carrier is without consideration, and the bill issued by the initial carrier governs the entire transaction. Missouri &c. R. Co. v. Ward, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. ed. 1213. See also Wabash Ry. Co. v. Holt, 263 Fed. 72.

[36] Gulf &c. R. Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. 926; Gulf &c. R. Co. v. Baird, 75 Tex. 256, 12 S. W. 530. This, however, is not free from doubt, for it would seem that the connecting carrier might receive and transport the goods as required by the statute, upon different terms from those specified in the contract with the initial carrier, and that it should make a special contract as to such terms if it desires not to be held to have adopted the original contract. See generally McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, affirmed in 174 U. S. 580, 19 Sup. Ct. 775, 43 L. ed. 1093.

[37] Cobb v. Abbott, 14 Pick. (Mass.) 289; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222. See also Smith & Elliott v. Missouri &c. R. Co., 58 Mo. App. 80; Ellsworth v. Tartt, 26 Ala. 733, 62 Am. Dec. 749; Kansas City &c. R. Co. v. Embrey, 76 Ark. 589, 90 S. W. 15, 16 (citing text and holding both companies liable for the negligence of their common agents).

[38] See Hart v. Rensselaer &c. R.

fact that they have a common agent may be taken into consideration, with other circumstances, as tending to show a partnership or joint enterprise, and if they hold him out as having authority to make them jointly liable he may do so in favor of one who rightfully relies on the apparent authority, although he has in fact no such authority.[39] But a general agent of the receiver of a railroad company was held, in a recent case, to be acting for the receiver, and not as the agent of a connecting carrier, in agreeing to forward a through shipment by a certain steamer sailing on a specified day, when his only authority, in any sense, as agent for the steamship company, was under a contract between the two companies, providing for the appointment of agents by the railroad company to quote through rates and issue through bills of lading, and the application for such shipment was made to him as agent for the receiver of the railroad company, and as such he signed letters confirming the rate, and so described himself in reporting to the steamship company.[40]

§ 2187 (1448). **Liability for their own defaults.**—As already stated, a connecting carrier is, in all states except Georgia, liable in an action by the shipper for its own defaults.[41] Consequently,

Co., 8 N. Y. 37, 59 Am. Dec. 447; Cincinnati &c. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354; Southern Pac. R. Co. v. Duncan, 16 Ky. L. 119; Swift v. Pacific Mail &c. Co., 106 N. Y. 206, 12 N. E. 583. Compare also Bobbink v. Erie R. Co., 82 N. J. L. 547, 82 Atl. 877.

[39] See Dye v. Virginia &c. R. Co., 9 Mackey (D. C.) 63; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; ante, § 2167. See also Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830.

[40] Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269.

[41] Ante, § 2180. See also Illinois Cent. R. Co. v. Cowles, 32 Ill. 117; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Cavallarro v. Texas &c. R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. 94. And in Georgia this is now the rule in some cases under the statute. Ga. Code, § 2084; Western &c. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102. And it is held that it is not changed by the Carmack Amendment although that makes the initial carrier also liable. Eastover &c. Co. v. Atlantic &c. R. Co., 99 S. Car. 470, 83 S. E. 599.

proof that the goods had been lost or damaged somewhere in transit would not necessarily render liable one connecting carrier not a partner of the others. If there is no assumption of extra-terminal liability by the initial carrier, and no partnership, the defaulting carrier must be charged singly, and the default located as occurring on its line,[42] except as the law is changed by the Carmack amendment or some other statute.[43] But if the act which occasions the loss or injury is that of the carrier against whom the action is brought it may be liable, although the injury or loss did not develop, or was not discovered until after delivery to a succeeding carrier.[44] Thus, where cattle are poisoned by the negligence of the prior carrier, or are not properly fed and watered by it, the fact that such cattle did not die until after they were delivered to a succeeding carrier will not relieve the carrier in default from liability, if their death was caused by its failure to perform its duty.[45] So, as we shall hereafter show, as it is easier

[42] Midland Railway v. Bromley, 17 Com. B. 372, 33 Eng. L. & Eq. 235; Gilbart v. Dale, 5 Ad. & El. 543; Anchor Line v. Dater, 68 Ill. 369; Chicago &c. R. Co. v. Northern &c. Co., 70 Ill. 217. See also Boston &c. R. Co. v. Ordway, 140 Mass. 510, 5 N. E. 627; Montgomery &c. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483; Marquette &c. R. Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453. This last case applies the rule in favor of the last carrier, as well as intermediate carriers, and, contrary to the weight of authority, denies that there is any presumption that the goods were received by it in good order, or that the loss occurred on its line.

[43] See ante, section on Carmack Amendment in last preceding chapter; also notes in 31 L. R. A. (N. S.) 1; 44 L. R. A. (N. S.) 257; Georgia &c. R. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 422, 60 L. ed. 948, Ann. Cas. 1918E, 32; New York &c. R. Co. v. Peninsula Produce Exch., 240 U. S. 34, 36 Sup. Ct. 230, 60 L. ed. 511, L. R. A. 1917A, 193; Southern Pac. R. Co. v. A. J. Lyon &c. Co., 107 Miss. 777, 66 So. 209, Ann. Cas. 1917D, 171.

[44] St. Louis &c. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802, 803 (citing text).

[45] Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855; Galveston &c. R. Co. v. Herring (Tex.), 24 S. W. 939; Fort Worth &c. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525. So held where goods were damaged because of unsuitable cars furnished by the first carrier, which were transported to their destination with seals unbroken. Alabama &c. R. Co. v. Searles, 71 Miss. 744, 16 So. 255; Searles v. Alabama &c. R.

for the carrier than for the shipper to trace the goods, and as a state of facts once shown to exist is presumed to continue, the last carrier is frequently held liable at common law, in the absence of anything to the contrary, upon the presumption that the loss occurred upon its line.

§ 2188 (1449). Duty of intermediate carrier—Extent and termination of liability.—It is the duty of an intermediate connecting carrier, in the absence of any special agreement or custom to the contrary, not only to carry the goods safely over its own line, but also to deliver them to the next succeeding carrier on the route, with proper instructions, if necessary, as to their further carriage, and it is not relieved of its responsibility as a common carrier by storing them in a warehouse at the end of its line without delivery or notice to the next carrier.[46] This liability

Co., 69 Miss. 186, 13 So. 815; Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031; Indianapolis &c. R. Co. v. Strain, 81 Ill. 504; St. Louis &c. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802, 803 (citing text and this note).

[46] Texas & P. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. ed. 358; Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Bancroft v. Merchants' &c. Co., 47 Iowa 262, 29 Am. Rep. 482; Louisville &c. R. Co. v. Bourne, 16 Ky. L. 825, 29 S. W. 975; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. R. Cas. 194; Rickerson &c. Co. v. Grand Rapids &c. R. Co., 67 Mich. 110, 34 N. W. 269; Irish v. Milwaukee &c. R. Co., 19 Minn. 376, 18 Am. Rep. 340; Hempstead v. New York &c. R. Co., 28 Barb. (N. Y.) 485; Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 360; McDonald v. Western R. Co., 34 N. Y. 497. But see Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762. And compare Louisville &c. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616. It has no right to assume, without cause, that the succeeding carrier will refuse to receive them. Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Blodgett v. Abbot, 72 Wis. 516, 7 Am. St. 873. But, after notice and refusal or the lapse of a reasonable time, the carrier may store them and become liable only as a warehouseman. Nutting v. Connecticut &c. R. Co., 1 Gray (Mass.) 502; Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394. See also Hornthal v. Roanoke &c. Co., 107 N. Car. 76, 11 S. E. 1049; American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Nashville &c. R. Co. v. David, 6 Heisk.

as a common carrier ordinarily continues until delivery to the next carrier or due notice is given, and a reasonable time has elapsed for the latter to receive the goods.[47] But where the carrier's responsibility is limited to its own line it is not liable at common law for delay occasioned by the inability or refusal of the next carrier to receive them.[48] It is its duty, however, as a general rule, where the next carrier refuses to take the goods, to use reasonable diligence to notify the consignor or the consignee, and to take care of them in the meantime.[49] But it has been held

(Tenn.) 261, 19 Am. Rep. 594; Buston v. Pennsylvania R. Co., 119 Fed. 808. There may, however, be cases where it should forward them by some other route if the carrier to which they are first tendered will not receive them.

[47] Wehmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546. Deposit of notice in a box in its own depot where the next carrier was accustomed to look for such notices has been held sufficient notice. Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Bennitt v. Missouri Pac. R. Co., 46 Mo. App. 656. But an actual tender of delivery may be required. Texas &c. R. Co. v. Clayton, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. ed. 725.

[48] Palmer v. Atchison &c. R. Co., 101 Cal. 178, 35 Pac. 630, 23 L. R. A. 388, 61 Am. & Eng. R. Cas. 235. See also Central R. &c. Co. v. Skellie, 86 Ga. 686, 12 S. E. 1017; St. Louis &c. R. Co. v. Marrs, 60 Ark. 637, 31 S. W. 42; Washburn-Crosby Co. v. Boston &c. R. Co., 180 Mass. 252, 62 N. E. 590. But compare Southard v. Minneapolis &c. R. Co., 60 Minn. 382, 62 N. W. 442, 619. As to what is not a sufficient delivery to dispense with notice to the shipper, see Railroad Co. v. Farmers' &c., 107 Ky. 53, 52 S. W. 972. But compare Pratt v. Railway Co., 95 U. S. 43, 24 L. ed. 336; Washburn-Crosby Co. v. Boston &c. R. Co., 180 Mass. 252, 62 N. E. 590.

[49] The Convoy's Wheat, 3 Wall. (U. S.) 225, 18 L. ed. 194; Peterson, In re, v. Case, 21 Fed. 885; Denver &c. R. Co. v. DeWitt, 1 Colo. App. 419, 29 Pac. 524; Georgia &c. R. Co. v. Cole, 68 Ga. 623; Grand Rapids &c. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 1069, 53 Am. St. 385; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; Lesinsky v. Great Western Despatch, 10 Mo. App. 134; Johnson v. New York &c. R. Co., 39 How. Pr. (N. Y.) 127; Goold v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398; Whitworth v. Erie R. Co., 87 N. Y. 413; Louisville &c. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253, 261; Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820. And, having done so, its liability as a carrier will cease, and it is only liable as a warehouseman. Buston v. Pennsylvania R. Co., 119 Fed. 808, 811 (citing text). See also as to its liability where it was unable to de-

that failure to give such notice will not render the carrier liable if it would not have prevented the loss and no injury was occasioned by reason of such failure.[50] So, it is said in a recent case that "the general rule of law is that an intermediate carrier, who receives goods to be carried to a point short of their destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting carrier," and that if acceptance is refused, on giving proper notice and storing the goods while awaiting instructions, it is liable only as a warehouseman.[51]

§ 2189 (1449a). Further of duty and liability of connecting carriers.—A carrier cannot violate a contract and at the same time claim the benefit of such contract, and, whether it is the initial carrier or an intermediate carrier, it may become liable for the loss of goods or injury thereto by a succeeding carrier, where, in the absence of an emergency, and without any necessity, it has deviated from the route prescribed by its contract or instructions, and forwarded the goods over another route or in another manner.[52] But to render the intermediate carrier liable for deviation, or to affect its rights in such a case, it must, as a general rule at least, have notice that a particular route is speci-

liver to the next carrier because of a strike and did not notify either the consignor or the consignee. Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283.

[50] Regan v. Grand Trunk R. Co., 61 N. H. 579.

[51] Buston v. Pennsylvania R. Co., 119 Fed. 808. That notice, at least, to next carrier, and not merely unloading goods at end of carrier's route is necessary, see Congdon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; McDonald v. Western R. Co., 34 N. Y. 497, cited in Texas &c. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 255, 46 L. ed. 358.

[52] Georgia R. Co. v. Cole, 68 Ga. 623; Robinson v. Merchants' &c. Co., 45 Iowa 470; Independence &c. Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Le Sage v. Great Western R. Co., 1 Daly (N. Y.) 306; Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416 and note; Hinckley v. New York &c. R. Co., 56 N. Y. 429; Fatman v. Cincinnati &c. R. Co., 2 Disney (Ohio) 248; Galveston &c. R. Co. v. Allison, 59 Tex. 193.

fied or of the limitations in the authority of the prior carrier.[53] It has also been held that where a common carrier receives goods known by it to be perishable, it must exercise due care and diligence to protect them, and must carry them in suitable cars, if such cars are in use, and that it cannot escape liability for not carrying them safely upon the ground that they were delivered to it by a preceding carrier in sealed cars, and that it was customary to haul such cars received from the preceding carrier without inspecting or changing the goods to other cars, nor upon the ground that the freight charged was for transportation in common cars, and that it had no refrigerator cars such as were required to keep the goods in perfect condition.[54] But in another recent case it was held that where goods are improperly loaded in sealed cars there is no duty resting upon the connecting carrier to open the cars and inspect their contents in the absence of knowledge that they are of such a character as to require such attention.[55] Although, as we have elsewhere seen,[56] one railroad company may be liable as a common carrier of the cars of another company, yet it has been held, in the absence of a controlling custom or contract, that a connecting carrier is under no obligation to take freight in the cars in which it is tendered,

[53] See Price v. Denver &c. R. Co., 12 Colo. 402, 21 Pac. 188; Patten v. Union Pac. R. Co., 29 Fed. 590; Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820; Missouri &c. R. Co. v. Stoner, 5 Tex. Civ. App. 50, 23 S. W. 1020. But this does not mean that it must always have actual notice.

[54] Beard & Sons v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381. See also Dixon v. Richmond &c. R. Co., 74 N. Car. 538; Hamilton v. Des Moines &c. R. Co., 36 Iowa 31; Philadelphia &c. R. Co. v. Diffendal, 109 Md. 494, 72 Atl. 193, 197 (citing text); Shea v. Railway Co., 66 Minn. 102, 68 N. W. 608; Higgins & Co. v. Chicago &c. Ry. Co., 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C 507, and note; Cartwright v. Rome &c. R. Co., 85 Hun 517, 33 N. Y. S. 147; Ruppel v. Allegheny &c. R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. 666; Willingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19; St. Louis &c. R. Co. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553.

[55] McCarthy v. Louisville &c. R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. 29, 61 Am. & Eng. R. Cas. 178. See also Texas &c. R. Co. v. O'Loughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104; and note in L. R. A. 1917C, 510, et seq.

[56] Ante, § 2098.

transport it in such cars when it has cars of its own not in use, and pay the owner of such cars mileage for their use,[57] and that it is no defense for it to show that the injury to the freight was caused by a defective car furnished by the preceding carrier and used by the carrier sued in transporting the freight over its own line in accordance with the contract between the preceding carrier and the shipper.[58]

§ 2190 (1450). Presumption against last carrier.—When goods are delivered to the first carrier in good order, and are afterwards injured, the presumption indulged at common law, in the absence of anything to the contrary, is that they were injured by the last carrier.[59] It has also been intimated that, in

[57] Oregon &c. R. Co. v. Northern Pac. R. Co., 51 Fed. 465, 472.

[58] Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19.

[59] Savannah &c. R. Co. v. Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. 551; Columbus &c. R. Co. v. Tillman, 79 Ga. 607, 5 S. E. 135; Central &c. R. Co. v. Bayer, 91 Ga. 115, 16 S. E. 953; Georgia &c. R. Co. v. Forrester, 96 Ga. 428, 23 S. E. 416; Lake Erie &c. R. Co. v. Oakes, 11 Ill. App. 489; Nashville &c. R. Co. v. Johnson (Ind. App.), 106 N. E. 414, 416 (citing text); Beard & Sons v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381; Philadelphia &c. R. Co. v. Diffendal, 109 Md. 494, 72 Atl. 193, 197 (citing text); Moore v. New York &c. R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. 298; Cote v. New York &c. R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. Rep. 656; Shriver v. Sioux City &c. R. Co., 24 Minn. 506, 13 Am. Rep. 353; Mobile &c. R. Co. v. Tupelo &c. Co., 67 Miss. 35, 7 So. 279, 19 Am. St. 262; note to Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228, 243; Flynn v. St. Louis &c. R. Co., 43 Mo. App. 424; Smith v. New York &c. R. Co., 43 Barb. (N. Y.) 225; Lindley v. Richmond &c. R. Co., 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31; Memphis &c. R. Co. v. Holloway, 9 Baxt. (Tenn.) 188; Louisville &c. R. Co. v. Tennessee Brew. Co., 96 Tenn. 677, 36 S. W. 392; Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56 and note; Texas &c. R. Co. v. Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801; Laughlin v. Chicago &c. R. Co., 28 Wis. 204, 9 Am. Rep. 493; note in 101 Am. St. 394, 395; note to Wood v. Maine Cent. R. Co., 99 Am. St. 366; 3 Elliott Ev. § 1917. But see Marquette &c. R. Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; Darling v. Boston &c. R. Co., 11 Allen (Mass.) 295. Compare also Stolze v. Ann Arbor &c. Ry. Co., 148 Wis. 205, 134 N. W. 376. And this rule is not changed by the fact that the last carrier transports them over its line in the foreign car in which it received them. Leo v. St. Paul &c. R. Co., 30

the absence of any evidence upon the subject, they will be presumed to have been delivered to the first carrier in good order, and that this presumption prevails as against each succeeding carrier, but we think this doctrine is unsound, for there is nothing upon which to base such a presumption; the owner has at least equal means of knowing the condition of the goods when delivered to the first carrier, and if they are in bad order when delivered by the last carrier, the same reason for presuming that they were originally in that condition may exist as for presuming that when started in good order they remained in that condi-

Minn. 438, 15 N. W. 872, 12 Am. & Eng. R. Cas. 35; Faison v. Alabama &c. R. Co., 69 Miss. 569, 13 So. 37, 30 Am. St. 577; Forrester v. Georgia &c. R. Co., 92 Ga. 699, 19 S. E. 811. "The proper rule," it is said in a recent case, "is that where goods are delivered to a common carrier to be carried by a series of connecting lines to the point of destination, and the goods are delivered in a damaged condition to the consignee, a prima facie case is made against the terminal carrier alone. If goods are delivered in good condition to the initial carrier, the presumption is that they were delivered to each successive carrier in the same condition. Railway v. Cushney, 95 Tex. 309, 67 S. W. 77; Railway v. Holder, 10 Tex. Civ. App. 223, 30 S. W. 383; St. Louis &c. R. Co. v. Cohen (Tex. Civ. App.), 55 S. W. 1123." Cane Hill &c. Co. v. San Antonio &c. R. Co. (Tex. Civ. App.), 95 S. W. 751. The presumption that the connecting carrier received the goods in the same condition in which they started has also been held to apply to an intermediate carrier sued for their loss or injury to them where it did not show that it delivered them to the last carrier in the same condition in which it received them. Savannah &c. R. Co. v. Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. 551. In such case it is held that where the terminal carrier shows that the damage was not caused on its line, the last intermediate carrier takes its place and is bound to show that it is not responsible. Missouri &c R. Co. v. Mazzie, 29 Tex. Civ. App 295, 68 S. W. 56. See also Montgomery &c. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483 (applying the rule in favor of the intermediate carrier); and Louisville &c. R. Co. v. Jones, 100 Ala. 263, 14 So. 114 (applying rule in favor of initial carrier and distinguishing Georgia &c. R. Co. v. Hughart, 90 Ala. 36, 8 So. 62, where it was held that if goods are lost and not delivered at all to the consignee, the presumption is against the first carrier). Where the goods are delivered to the first carrier and in good condition and are delivered by the last of several connecting carriers to the consignee in a damaged condition it is held that there is no presumption against the first carrier. Farming-

tion until after they were received by the last carrier.[60] Thus, where barrels of molasses were shipped and transported to their destination in a sealed car, and there was no evidence as to the number of barrels or their condition at the time the car was sealed by the first carrier, it was held that the last carrier was entitled to the benefit of the presumption that the number of barrels was the same and their contents in the same condition when they were taken out and delivered by it as when the car was first sealed, and that it was not liable as for failure to safely carry and deliver one barrel of molasses, where it appeared that the barrel was empty and dry when the car was opened by it at the point of destination.[61] Where there was evidence that the weather was very cold before the second carrier received apples, which it delivered in a frozen condition, and no evidence that they were delivered to it before they were frozen, it was held that it was not liable,[62] and a similar decision was rendered where

ton &c. Co. v. Chicago &c. R. Co., 166 Mass. 154, 44 N. E. 131. See also Best v. Great Northern Ry. Co., 159 Wis. 429, 150 N. W. 484; Tradewell v. Chicago &c. Ry. Co., 150 Wis. 259, 136 N. W. 794. And the same has been held where part of them have been lost. Gwyn &c. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268, note in 101 Am. St. 396. But where there is a total loss it has been held, as shown in the last note to this section, that the first carrier is prima facie liable.

[60] Pittsburgh &c. R. Co. v. La Rosa (Ind. App.) 131 N. E. 21, 23, 24 (quoting text); Missouri Pac. R. Co. v. Breeding, 4 Tex. App. (Civil Cas.) 217, 16 S. W. 184; Gulf &c. R. Co. v. Holder, 10 Tex. 223, 30 S. W. 383; Evans v. Atlanta &c. R. Co., 56 Ga. 498; Goodman v. Oregon &c. R. Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87, 97; Lake Erie &c. R. Co. v. Oakes, 11 Ill. App. 489.

[61] Cooper v. Georgia &c. R. Co., 92 Ala. 329, 9 So. 159, 25 Am. St 59.

[62] Swetland v. Boston &c. R. Co., 102 Mass. 276. But in another case it was held that where apples shipped over connecting roads were in good condition when received by the first carrier and were damaged by frost when delivered by the last carrier, the burden was on such last carrier to show that the loss did not result from any cause for which it was responsible, even though the apples were transported in through sealed cars. Beede v. Wisconsin Cent. R. Co., 90 Minn. 36, 95 N. W. 454, 101 Am. St. 390, and note, citing Leo v. St. Paul &c. R. Co., 30 Minn. 438, 15

it appeared that the goods must have been wet and damaged while in the hands of a preceding carrier.[63] So, where a theater drop-curtain, shipped over several connecting lines, was injured by water, it was held that the defendant might show that it did not rain while the curtain was in transit over its line.[64] As may be seen by an examination of the authorities already cited, the presumption which is usually indulged against the last carrier may not arise under the facts of the particular case, and even if it does arise upon the plaintiff's proof in the first instance, it may be rebutted by proper evidence, either direct or circumstantial, showing that the goods were not received by the defendant in good order, or that they were lost or injured on some other line and not by it. This is true, even where the presumption is strengthened by a receipt, as the latter is prima facie rather than conclusive evidence, and is equally open to contradiction or explanation.[65] It has also been laid down as a general rule that,

N. W. 872. See also as to perishable goods generally. Forrester v. Georgia &c. R. Co., 92 Ga. 699, 19 S. E. 811; Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381. In Calender &c. Co. v. Chicago &c. R. Co., 99 Minn. 295, 109 N. W. 402, it was held that the presumption was that apples shipped from New York in a sound condition, were in such condition when delivered to the connecting carrier at Chicago, but that such presumption was not conclusive; that "it being a hazardous and unusual proceeding to ship apples in bulk in box freight cars from the state of New York to Minneapolis, Minn., during the month of November, owing to the liability of encountering cold weather, a connecting railroad at Chicago, over which the car is routed to the point of delivery, is not required to anticipate that a car of apples so loaded will be delivered upon its yard tracks, and be prepared to take extraordinary precautions to protect the fruit from frost," but that the fact that the shipper packed and shipped fruit in the manner indicated, at that season of the year, did not constitute contributory negligence so as to preclude recovery for such damages as such carrier might have prevented in the exercise of reasonable care.

[63] Carson v. Harris, 4 Greene (Iowa) 516.

[64] Burwell v. Raleigh &c. R. Co., 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410.

[65] Burwell v. Raleigh &c. R. Co., 94 N. Car. 451, 25 Am. & Eng. R. Cas. 410; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Gulf &c. R. Co. v. Holder, 10 Tex. 223, 30 S. W. 383; Hunt v. Michigan &c. R. Co.,

where goods are found damaged in the hands of one connecting carrier, that carrier is presumed to have caused the damage, and the burden is upon it to rebut the presumption.[66] And where goods are wholly lost, and do not reach their destination, it is held that the first carrier is prima facie responsible for the loss.[67] There is conflict among the decisions as to whether the ordinary common law presumption against the last carrier obtains in cases coming within the Carmack amendment, but the weight of authority in the state courts seems to be that it does in a proper case.[68]

37 N. Y. 162 (receipt by connecting carrier insufficient to relieve initial carrier). See generally as to evidence to rebut the presumption, Vicksburg &c. R. Co. v. Stocking (Miss.), 13 So. 469; Columbus &c. R. Co. v. Tillman, 79 Ga. 607, 5 S. E. 135; Goodman v. Oregon &c. Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87, and compare Gulf &c. R. Co. v. Edloff (Tex.), 34 S. W. 410, affirmed in 89 Tex. 454, 34 S. W. 414, 35 S. W. 144.

[66] Morgantown Mfg. Co. v. Ohio River &c. R. Co., 121 N. Car. 514, 28 S. E. 474, 61 Am. St. 679; Hinkle v. Southern R. Co., 126 N. Car. 932, 36 S. E. 348, 78 Am. St. 685; Gwyn &c. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675.

[67] Ohio &c. R. Co. v. Emrich, 24 Ill. App. 245; International &c. R. Co. v. Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541; Brintnall v. Saratoga &c. R. Co., 32 Vt. 665. See also McDowell v. Joice, 46 Ill. App. 627; Church v. Atchison &c. R. Co., 1 Okla. 44, 29 Pac. 530; Romero v. McKernan, 88 N. Y. S. 365; Texas &c. R. Co. v. Berry, 31 Tex. Civ. App. 3, 71 S. W. 326.

[68] Erisman v. Chicago &c. R. Co., 180 Iowa 759, 163 N. W. 627; Duvall v. Louisiana &c. R. Co., 135 La. 189, 65 So. 104; Chicago &c. Ry. Co. v. Harrington, 44 Okla. 41, 143 Pac. 325, Ann. Cas. 1916E, 748. See also Central of Ga. Ry. Co. v. Scrivens, 24 Ga. App. 177, 100 S. E. 233; C. C. Whitnack Produce Co. v. Chicago &c. Ry. Co. (Nebr.), 178 N. W. 177 (petition for certiorari granted, however, in 41 Sup. Ct. 15.) Contra, Carlton Produce Co. v. Velasco &c. Ry. Co. (Tex. Civ. App.), 131 S. W. 1187. But compare Houston &c. R. Co. v. Reicherdt &c. Co. (Tex. Civ. App.), 212 S. W. 208. The question does not seem to have been directly decided by the Supreme Court of the United States, but the holding of the majority of the state courts that have considered it may be questionable under the opinion in Charleston &c. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. ed. 1137, Ann. Cas. 1916D, 333n. We think it should at least be shown that the goods came into the hands of the initial carrier in good condition, but where this is shown, and nothing to the contrary thereafter

§ 2191 (1451). Rights and liabilities as to charges.—As a general rule, where goods are delivered to a carrier for shipment to a destination beyond its line, whether the freight is prepaid or not, succeeding carriers who receive the goods in good faith in the ordinary and usual course of business between connecting carriers, and without notice of any special directions by the consignor or limitation upon the apparent authority of the first carrier, are not bound by any secret contract between the consignor and the first carrier for reduced freight or for shipment over a certain route, but are entitled to reasonable charges for their services, and to a lien for their own charges, and for freight rightfully paid by them to prior connecting carriers upon the route.[69] So, where a shipper is present and makes no objection

there does not seem to be anything to prevent the presumption from arising.

[69] Patten v. Union Pac. R. Co., 29 Fed. 590; Loewenberg v. Railway Co., 56 Ark. 439, 19 S. W. 1051; Price v. Denver &c. R. Co., 12 Colo. 402, 21 Pac. 188, 37 Am. & Eng. R. Cas. 626; Georgia &c. R. Co. v. Murrah, 85 Ga. 343, 11 S. E. 779, 45 Am. & Eng. R. Cas. 334; Briggs v. Boston &c. R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Wells v. Thomas, 27 Mo. 17. 72 Am. Dec. 228 and note; Moore v. Henry, 18 Mo. App. 35; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46; Vaughan v. Providence &c. R. Co., 13 R. I. 578; Sumner v. Southern R. Assn., 66 Tenn. 345, 32 Am. Rep. 565, 9 Am. & Eng. R. Cas. 18; Missouri &c. R. Co. v. Stoner, 5 Tex. Civ. App. 50; Moses v. Port Townsend &c. R. Co., 5 Wash. 595, 32 Pac. 488; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56. See also Gulf &c. R. Co. v. Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. 926; Georgia &c. R. Co. v. Smith, 83 Ga. 626, 10 S. E. 235; Southern Kans. R. Co. v. Duncan, 40 Kans. 503, 20 Pac. 195. But see Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33, and Marsh v. Union Pac. R. Co., 3 McCrary (U. S. C. C.) 236, both of which are disapproved in Crossan v. New York &c. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766 and note, 14 Am. St. 408. In Illinois Cent. R. Co. v. Brookhaven &c. Co., 71 Miss. 663, 16 So. 252, it is held that this rule does not apply as to charges of a prior carrier which are in excess of the amount fixed by its special contract and which the connecting carrier is seeking to collect but has not paid In Gooding v. Southern R. Co., 125 Ga. 630, 54 S. E. 720, the general rule stated in the text is laid down and enforced and it is held that where the first company, without knowledge of or any arrangement with connecting carriers,

when the connecting carrier receives the goods from the preceding carrier and pays the charges thereon, he cannot set off a claim for injury to the goods by the first carrier against the claim of the connecting carrier for charges, notwithstanding the connecting carrier knew that the goods had been injured, and that the shipper intended to demand compensation from such preceding carrier.[70] And it has been held that, although the first carrier gives a bill of lading which states a certain sum as the full rate, if the shipper, upon demand of the connecting carrier when the goods arrive at their destination, voluntarily pays an additional sum, he cannot recover it back from the latter.[71] The theory upon which

makes a guaranty that the freight shall not exceed a certain sum, which is less than the usual rate, each succeeding company may charge and pay preceding charges at the usual rate, and the last one may have a lien therefor, and the shipper's remedy is against the first one. So, "where the agent of the defendant company (a terminal carrier) at the station to which such freight is carried demands a sum as freight greater than that fixed in the bill of lading issued by the initial carrier, and in consequence of the consignee's refusal to pay more than the latter sum the shipment is not delivered for a period of 10 days, the last carrier is not liable in damages to the consignee on account of such delay, even though at the expiration of the time named the goods are delivered upon the payment of the amount of freight set out in the bill of lading, where it does not appear that the amount demanded by the defendant's agent was in excess of the legal and proper charges according to the fixed and usual rates, nor that there existed between the defendant company and the initial carrier contractural relations with reference to transportation charges." But compare Beasley v. Baltimore &c. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048; Alcorn v. Adams Exp. Co., 148 Ky. 352, 146 S. W. 747, 52 L. R. A. (N. S.) 858n. And see where the connecting carrier had notice of facts sufficient to put it on inquiry, Converse Bridge Co. v. Collins, 119 Ala. 534, 24 So. 561.

[70] St. Louis &c. R. Co. v. Lear, 54 Ark. 399, 15 S. W. 1030, 55 Am. & Eng. R. Cas. 414. See also Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 80; Bissel v. Price, 16 Ill. 408; Bowman v. Hilton, 11 Ohio 303.

[71] Mount Pleasant &c. Co. v. Cape Fear &c. R. Co., 106 N. Car. 207, 10 S. E. 1046, 42 Am. & Eng. R. Cas. 498. See also Illinois Glass Co. v. Chicago Tel. Co., 234 Ill. 535, 85 N. E. 200, 18 L. R. A. (N. S.) 124n. But compare Osborne v. Chicago &c. R. Co., 48 Fed. 49. And see as to recovery from initial carrier, Little Rock &c. R. Co. v.

the connecting carrier is held not to be bound by special instructions or agreements between the shipper and the first carrier is that the shipper makes the initial carrier his own forwarding agent, and should look to it for redress rather than to an independent connecting carrier, which, as it is usually bound to receive and carry goods properly delivered to it in the customary manner, is also entitled to its usual charges and the charges of prior connecting carriers advanced by it in the usual course of business.[72] But if the connecting carrier has notice that the initial carrier has fraudulently diverted the goods from the line specifically designated to that of the connecting carrier, and the latter becomes a party to the fraud for the purpose of getting the advantage of the rival line over which the contract provided that he goods should be shipped, it is not entitled to a lien either for charges for its own services or for those advanced by it to the first carrier.[73] So, generally, if the possession of the property is not obtained in good faith in the usual course of business, but is wrongful and illegal, the carrier is not entitled to a lien thereon either for its own charges or for those advanced to the prior carrier.[74] And if a partnership exists between the carriers, or if the connecting carrier holds the initial carrier out to the world as its agent, with apparent authority to bind it in such matters, it

Daniels, 49 Ark. 352, 5 S. W. 584; Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031; Virginia Coal &c. Co. v. Louisville &c. R. Co., 98 Va. 776, 37 S. E. 310.

[72] See Georgia R. Co. v. Murrah, 85 Ga. 343, 11 S. E. 779; Mt. Pleasant Mfg. Co. v. Railroad Co., 106 N. Car. 207, 10 S. E. 1046; Schneider v. Evans, 25 Wis. 241, 3 Am Rep. 56; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228. See also Price v. Denver &c. R. Co., 12 Colo. 402, 21 Pac. 188; Thomas v. Frankfort &c. R. Co., 116 Ky. 879, 76 S. W. 1093; Moses v. Port Townsend &c. R. Co., 5 Wash. 595, 32 Pac. 488, 1000.

[73] Denver &c. R. Co. v. Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376, 40 Am. & Eng. R. Cas. 145; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

[74] Robinson v. Baker, 59 Mass. 137, 51 Am. Dec. 54; Stevens v. Boston &c. R. Co., 8 Gray (Mass.) 262; Andrews v. Dieterich, 14 Wend. (N. Y.) 31; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33. See also Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Bissel v. Price, 16 Ill. 408. But compare Walker v. Cassaway, 4 La. Ann. 19, 50 Am. Dec. 551.

may lose the right which it might otherwise have to a lien for charges in excess of those fixed in the contract with the initial company, or payment of charges advanced by it.[75] So, as against innocent third persons who have taken a bill of lading for value upon the faith of the representations therein that the freight charges were all prepaid, the connecting carrier may not be entitled to enforce a lien for its own charges or for those paid by it to the prior carrier thereafter, particularly where it has notice or information sufficient to put it upon inquiry as to the negotiation and ownership of the bill of lading.[76] It has been held that a connecting carrier is under no obligation to pay accrued charges upon freight tendered to it by a preceding carrier,[77] and that it has no right to detain freight received by it from another carrier until it has received a bill of back charges;[78] but it has also been held, on the other hand, that when several independent carriers successively receive goods for transportation each is entitled to payment of the charges in advance, or to a lien on the goods for the same,[79] and that if the initial carrier neglects to inform

[75] See Evansville &c. R. Co. v. Marsh, 57 Ind. 505; Harp v. The Grand Era, 1 Woods (U. S. C. C.) 184; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; Norfolk &c. R. Co. v. Read, 87 Va. 185, 12 S. E. 395. See also Beasley v. Baltimore &c. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048n; Alcorn v. Adams Exp. Co., 148 Ky. 352, 146 S. W. 747, 52 L. R. A. (N. S.) 858n (connecting carrier should ascertain contract under which goods are being carried and is liable in damages for refusing to deliver without payment of charges contrary to original contract of shipment).

[76] American Nat. Bank v. Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. 155.

[77] Baltimore &c. R. Co. v. Adams Ex. Co., 22 Fed. 32; Oregon &c. R. Co. v. Northern Pac. R. Co., 51 Fed. 465. See also New York &c. R. Co. v. National &c. Co., 137 N. Y. 23, 32 N. E. 993. And compare Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749, Ann. Cas. 1916B, 1217n, where charges were lodged against the goods received.

[78] Dunham v. Boston &c. R. Co., 70 Maine 164, 35 Am. Rep. 314; Michaels v. New York &c. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Root v. Great Western R. Co., 45 N. Y. 524. But see Judson v. Western R. Co., 86 Mass. 520, 81 Am. Dec. 718; Livingston v. New York &c. R. Co., 76 N. Y. 631.

[79] Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90. See also

the succeeding carrier of the payment of the freight charges the latter may detain the goods for a reasonable time in which to ascertain the facts.[80] The rules stated in this section generally obtain at common law, but some of them may not apply under particular state statutes, or, in case of interstate shipments, under Interstate Commerce Act and amendments.

§ 2192 (1452). Liability of carriers as between themselves—Action over.—It is said that "the common-law obligations of a railroad company to a connecting line are the same as to reception, transportation and delivery of freight as those existing between a railroad company and an individual shipper."[81] This statement, in its unlimited and unqualified form, is, perhaps, too broad, but it is true in the main. Thus, it has been held that the one carrier has no more right to require another carrier to stop its trains and deliver and receive passengers and freight at the junction of the two roads, where the former has established a station only half a mile from a station already established on the other road, than an individual would have to require the trains of a carrier to stop at the point nearest his house and most convenient to him.[82] So, the initial carrier stands as to

Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137, and compare Grand Rapids &c. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385.

[80] Union Ex. Co. v. Shoop, 85 Pa. St. 325. In Berry &c. Co. v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714, it is held that where a shipment over the lines of several carriers is not made under a through bill of lading, and the different carriers concerned are not shown to constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may pay apparently proper transportation charges demanded by a previous carrier, or hold the property according to any lawful directions given for the enforcement of a lien for such charges, unless it has notice or knowledge that in the particular instance the charge is unlawful; and, while it must act in good faith towards the consignee, it is not bound to investigate at its own inconvenience and expense the merits of an apparently just claim preferred by a preceding carrier. See also Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. ed. 397.

[81] Ray Freight Carriers, 390.

[82] Shelbyville &c. R. Co. v. Louisville &c. R. Co., 82 Ky. 541, 21 Am. & Eng. R. Cas. 233. See also Kentucky &c. Bridge Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289.

the succeeding carrier, in most respects, as the owner of the goods, and usually has authority to contract with the succeeding carrier on behalf of the owner.[83] But usage or custom may often exert an important influence upon the relative rights, duties and liabilities of the different carriers as among themselves, particularly in regard to delivering and receiving goods, which, if unknown to the shipper, and not such as he ought to take notice of, would not affect the rights of the shipper.[84] So, carriers may sometimes be held liable to a shipper as partners, when, as between themselves, they are not partners, and private arrangements between themselves may bind them without in any way binding the shipper or affecting their duties and liability to him.[85] The shipper may usually sue either an initial carrier, which undertakes to transport goods over connecting lines without limiting its liability to its own line or the carrier which is guilty of the default or commits the injury, but, as between the carriers, the general rule is that each one is liable for the result of its own negligence or breach of duty, and, although the first carrier may have assumed the responsibility for the transportation of the goods beyond its own line, and damages may be recovered against it by the shipper for a failure in that regard, yet the carrier which actually causes the injury will be liable to it for such damages.[86] If the carrier which caused the injury is duly noti-

[83] Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; Marquette &c. R. Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; York Co. v. Cent. R. Co., 3 Wall. (U. S.) ~~113~~, 18 L. ed. 171.

[84] Wallace v. Rosenthal, 40 Ga. 419; Conkey v. Milwaukee &c. R. Co., 31 Wis. 619, 11 Am. Rep. 630; Condon v. Marquette &c. R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367; McDonald v. Western R. Co., 34 N. Y. 497. See ante, § 2183, and notes.

[85] Ante, § 2185. See also Bobbink v. Erie R. Co., 82 N. J. L. 547, 82 Atl. 877.

[86] Missouri Pac. R. Co. v. Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. Rep. 437; Chicago &c. R. Co. v. Northern &c. Co., 70 Ill. 217; Vermont &c. R. Co. v. Fitchburg R. Co., 96 Mass. 462, 92 Am. Dec. 785; Cane Belt R. Co. v. Missouri &c. R. Co., 44 Tex. Civ. App. 221, 98 S. W. 1066; Conkey v. Milwaukee &c. R. Co., 31 Wis. 619, 11 Am. Rep. 630. But see New York &c. R. Co. v. National &c. Co., 137 N. Y. 23, 32 N. E. 993. As to when the statute of limitations begins to run against such an action,

fied to come in and defend the action against the initial carrier, or, it seems, even if it is not expressly notified to defend, if it knows that it alone caused the injury, and is liable over and is aware of the pendency of the suit and its right to defend, the judgment against the initial carrier therein will be conclusive against such connecting carrier as to the amount of the damages in an action against it by the initial carrier.[87] The Carmack amendment, as elsewhere shown,[88] makes the initial carrier liable to the holder of the bill of lading notwithstanding any attempt to limit its liability to its own line, but it may recover against the company causing the loss, damage, or injury, such amount as it has thus been required to pay, "as may be evidenced by

see Pennsylvania Co. v. Chicago &c. R. Co., 144 Ill. 197, 33 N. E. 415, 55 Am. & Eng. R. Cas. 424. In Southern R. Co. v. Waters Co., 125 Ga. 520, 54 S. E. 620, it is said: "When there are several connecting railroads of different companies, and the goods are intended to be transported over more than one, each company is responsible to its own terminus before delivery to the connecting railroad, and the last company which received the goods as 'in good order' is responsible to the consignee for any damage, open or concealed, done to the goods, and the companies must settle among themselves the question of ultimate liability."

[87] Missouri Pac. R. Co. v. Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. 437. See also Elliott Roads and Streets (3d ed.), § 1170; 3 Elliott Ev. § 2518. But compare Paxendale v. London &c. R. Co., 44 L. J. Ex. 20, L. R. 10 Ex. 35. The judgment is not, of course, conclusive as to the liability of the second company to the first. Chicago &c. R. Co. v. Northern &c. Co., 70 Ill. 217. In Texas &c. R. Co. v. Warner, 42 Tex. Civ. App. 280, 93 S. W. 489, which was an action against two carriers for damages to goods transported over their lines, an instruction to the effect that if the initial carrier in reloading the shipment did not exercise ordinary care, and such failure was the proximate cause of damage, while on the line of the terminal carrier, the jury should find for the terminal carrier over against the initial carrier such damages as occurred between those points, and also that, if the initial carrier exercised ordinary care, the jury should not find against it anything for damages occurring on the line of the terminal carrier, and that, if a part of the damage occurred on each of the roads, the jury should find against each defendant the damages that occurred on its line without the fault of the other, was held to fairly present the law.

[88] See section in last preceding chapter on Carmack amendment.

any receipt, judgment or transcript thereof." A contract between a shipper and an initial carrier, whereby such carrier agrees to transport goods over its own line and deliver them to a designated independent connecting carrier for transportation to their destination, may incidentally be of advantage to the connecting carrier, but it is not a contract for the benefit of the connecting carrier in such a sense as to give the latter a right of action against the initial carrier for violating the contract by delivering the goods to another connecting carrier for transportation to their destination.[89]

[89] St. Louis &c. R. Co. v. Missouri Pac. R. Co., 35 Mo. App. 272.

CHAPTER LXIX

COMMON-LAW DUTIES OF COMMON CARRIERS

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§ 2200 (1453). Who are railroad carriers—Fast freight lines —Union depot companies—Express companies.—Under the term "railroad carriers" we include all persons and corporations that undertake to carry goods over lines of railways. As elsewhere appears, express companies, fast freight companies, despatch companies, and other organizations of a similar character, are regarded by us as railroad carriers.[1] We have availed ourselves of the privilege which John Stuart Mill says authors possess, of giving our definitions and employing the terms as we have defined them. A fast freight or despatch company is not in the strict sense a railroad carrier, but the courts have treated such companies as railroad carriers and held them subject to the duties and liabilities of railroad carriers. These companies often make contracts with the railroad companies, and the latter have endeavored by that means to escape liability in their capacity of common carriers, but the courts have steadfastly refused to permit them to avoid liability by such means.[2] The law will not

[1] Ante. § 2105.

[2] In the case of Bank of Kentucky v. Adams &c. Co., 93 U. S. 174, 23 L. ed. 872, it was said: "Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner, some of the responsibilities of common carriage are often sought to be evaded but in vain. Public

permit railroad carriers to escape their duties as common carriers by assuming the title of "forwarders" or the like, or by employing any similar means. The court will look through form to substance and hold them to a due performance of their duties as common carriers.[3] Union depot companies may, under some circumstances, be common carriers.[4] If they undertake any part of the duty of carrying the goods as independent carriers or connecting carriers, we suppose that they would be held liable as common carriers.[5] Where, however, a union depot company is formed of several railroad companies, and simply maintains a depot for the receipt and discharge of goods, we do not think

policy demands that the right of the owners to absolute security against the negligence of the carrier and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company." See generally Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679; Shearer v. Pacific &c. Co., 43 Ill. App. 641.

[3] Merchants' &c. Co. v. Joesting, 89 Ill. 152; Barre v. American Forwarding Co., 146 Ill. App. 388, affirmed in 242 Ill. 298, 89 N. E. 1021; Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68; Christenson v. American &c. Co., 15 Minn. 270, 2 Am. Rep. 122; Oderkirk v. Fargo, 58 Hun 347, 11 N. Y. S. 871; Read v. Spaulding, 5 Bosw. (N. Y.) 395; United States &c. Co. v. Backman, 28 Ohio St. 144; Southern &c. Co. v. McVeigh, 20 Grat. (Va.) 264. See generally Wells v. American &c. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; Galt v. Adams Ex. Co., McAr. & M. (U. S. C. C.) 124, 48 Am. Rep. 742; Southern &c. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102; Bardwell v. American &c. Co., 35 Minn. 344, 28 N. W. 925; Hadd v. United States &c. Co., 52 Vt. 335, 36 Am. Rep. 757; Lee v. Fidelity Storage &c. Co., 51 Wash. 208, 98 Pac. 658; In re Emerson &c. Co., 199 Fed. 95, 98.

[4] People v. Cheeseman, 7 Colo. 376, 3 Pac. 716, 16 Am. & Eng. R. Cas. 400; Challiss v. Atchison &c. R. Co., 45 Kans. 398, 25 Pac. 894; Worcester v. Norwich &c. R. Co., 109 Mass. 103; Fort St. &c. Co. v. Morton, 83 Mich. 265, 47 N. W. 228; Fort St. Union Depot Co. v. Railroad Comrs., 118 Mich. 340, 76 N. W. 631; Union Depot &c. Co. v. Chicago &c. Co., 113 Mo. 213, 20 S. W. 792, 56 Am. & Eng. R. Cas. 245; State v. St. Paul &c. R. Co., 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234. As bearing upon the organization, rights, powers and duties of union depot companies, see St. Paul &c. Depot Co. v. Minnesota &c. R. Co., 47 Minn. 154, 49 N. W. 646, 13 L. R. A. 415; King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

[5] Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559.

it could be considered a common carrier, but so much depends upon the statute governing the particular case and upon the facts of such case that it is unsafe to attempt to lay down a general rule. The employes of a union depot company may be, in a restricted sense, the agents of each of the several companies forming the union company. Thus, where the ticket-seller of the union company has authority to sell tickets for all the constituent companies, the request for a ticket over the line of one of such companies calls upon the ticket-seller to act as the agent of the company over whose line the passenger desires to travel.[6] In a case where two railroad companies used one depot, but only one of them used it in the nighttime, it was held that there was no liability on the part of the company not using the depot in the nighttime for the injury due to a failure to light the depot,[7] and upon the reasoning of the opinion in that case it would seem to follow that each of the several companies, and not the union company, would be liable for its torts. But there may, of course, be torts committed by the employes of the union company acting for that company and not for any one of the constituent companies, and in such a case the union company, if the constituent companies were not partners or otherwise jointly bound, would alone be liable.[8] Express companies derive their rights from the railroad companies upon whose lines they do business, and an express company cannot stipulate that it shall not be liable for the negligence of the company[9] from which the rights are ac-

[6] Scott v. Cleveland &c. R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154. See also Jacobs v. Tutt, 33 Fed. 412; Turner v. Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883; Hillary v. Great Northern R. Co., 64 Minn. 361, 67 N. W. 80, 32 L. R. A. 448. And see generally Hunt v. New York &c. R. Co., 212 Mass. 102, 98 N. E. 787, 40 L. R. A. (N. S.) 778 and cases cited in opinion and note; also Chicago &c. R. Co. v. Stipp, 164 Fed. 785, 22 L. R. A. (N. S.) 350; and note to Union Depot &c. Co. v. Londoner, in 33 L. R. A. (N. S.) 433.

[7] Louisville &c. R. Co. v. Treadway, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794.

[8] Indianapolis &c. R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219. See also Dean v. St. Paul &c. Co., 41 Minn. 360, 43 N. W. 54, 5 L. R. A. 442, 16 Am. St. 703.

[9] Bank of Kentucky v. Adams &c. Co., 93 U. S. 174, 23 L. ed. 872. See Packard v. Taylor, 35 Ark.

quired. As we have elsewhere said, the common law forbidding discrimination does not inhibit a railroad company from giving the right to do business over its road to one express company to the exclusion of others.[10]

§ 2201 (1454). General nature of the common-law duty.— As we have elsewhere said railroad carriers are invested with rights of a public nature,[11] and are charged with duties of a public character. As we have heretofore shown, and as we shall hereafter more fully show, they are, in their capacity of common carriers, subjected to governmental control and regulation because of the public nature of their rights and duties. They are, however, regulated and controlled both by statute and by the rules of the common law. Statutes in many of the states have limited the rights, enlarged the duties and increased the liabilities of railroad carriers and so has the statute of the United States generally known as the "Interstate Commerce Law," but it is our purpose in this chapter to treat of the common-law rules and not of those prescribed by statutes, state or national. The common law imposes very onerous duties upon carriers and holds them to very strict accountability. These rules prevail except where they have been changed or abrogated by statute. By the

402. 37 Am. Rep. 37; Boscowitz v. Adams &c. Co., 93 Ill. 523, 34 Am. Rep. 191; Adams &c. Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666, 55 Am. & Eng. R. Cas. 319.

[10] Memphis &c. R. Co. v. Southern &c. R. Co., 117 U. S. 1, 6 Sup. Ct. 542, 29 L. ed. 791, 23 Am. & Eng. R. Cas. 545; United States v. Delaware &c. R. Co., 40 Fed. 101; Little Rock &c. R. Co. v. East Tennessee &c. R. Co., 47 Fed. 771; Ilwaco &c. R. Co. v. Oregon &c. Co., 57 Fed. 673; Pfister v. Central &c. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Delaware &c. Co. v. Central &c. Co., 43 N. J. Eq. 77, 10 Atl. 602; ante, § 2200. See generally as to the doctrine of unjust discrimination as applied to express companies. International &c. Co. v. Grand Trunk &c. R. Co., 81 Maine 92, 16 Atl. 370, 37 Am. & Eng. R. Cas. 622; Alsop v. Southern &c. Co., 104 N. Car. 278, 10 S. E. 297, 6 L. R. A. 271, 41 Albany L. J. 167; Sargent v. Boston &c. R. Co., 115 Mass. 416; The D. R. Martin, 11 Blatchf. (U. S.) 233.

[11] Ante, § 2097. As to the rule that railroad companies are common carriers, see St. Joseph &c. R. Co. v. Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335; Atchison &c. R. Co. v. Washburn, 5 Nebr. 117.

common law carriers are bailees for hire but their liability is much greater than those of ordinary bailees for hire or reward. The liability of common carriers of goods is an extraordinary one, and does not depend upon the question of negligence or no negligence, for they may be liable for the loss of goods or for injury to them, although there has been, on their part no negligence. They are in effect insurers of the goods entrusted to them for transportation,[12] and according to the old common-law rule can escape liability only upon some one of the following grounds, namely, that the loss or injury was caused by the act of God, or by the act of the public enemy. The modern rule is more liberal, for, to the old common-law grounds which will exonerate the carrier from liability have been added the following, namely, acts of the public authorities, and loss or injury attributable to the inherent nature of the goods. It is sometimes said that another ground has been added by the modern law, namely, that arising from the acts of the shipper, but we think there never was a time when the carrier could be held liable where the loss was caused by the wrong or fault of the shipper. The duties of common carriers as such do not rest upon contract but are imposed

[12] Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762; McCarthy v. Louisville &c. R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. 29; Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37; Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. 230, and note; Bohannan v. Hammond, 42 Cal. 227; Lewis v. Ludwick, 6 Colo. 368, 98 Am. Dec. 454; Culbreth v. Philadelphia &c. R. Co., 3 Houst. (Del.) 392; Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252; Richmond &c. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446; Chicago &c. R. Co. v. Shea, 66 Ill. 471; Pittsburgh &c. Ry. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. 316, 321 (citing text); Louisville &c. R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. 206; Swiney v. American Co., 144 Iowa 342, 115 N. W. 212, 122 N. W. 957; Hall v. Renfro, 3 Metc. (Ky.) 51; Robertson v. Kennedy, 32 Ky. 430, 26 Am. Dec. 446; Fillebrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606; Davis v. Wabash &c. R. Co., 89 Mo. 340, 1 S. W. 327, 26 Am. & Eng. R. Cas. 315; Church v. Chicago &c. R. Co., 81 Nebr. 615, 116 N. W. 520; McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 288, 45 Am. St. 674; Watson v. Memphis &c. R. Co., 9 Heisk. (Tenn.) 255.

by law.[13] As the duties of common carriers are imposed by law they are not at liberty to arbitrarily refuse to carry,[14] nor to make unjust discriminations[15] nor have they a right to impose such limitations as they choose. But while there is no general right to impose limitations there is according to the great weight of authority, a right within reasonable bounds to impose limitations.[16]

[13] Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Carroll v. Staten Island &c. R. Co., 65 Barb. (N. Y.) 32; Thurman v. Wells, 18 Barb. (N. Y.) 500. See also Johnson v. East Tennessee &c. R. Co., 90 Ga. 810, 17 S. E. 121; Delaware &c. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. 442.

[14] New Jersey &c. R. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; York Co. v. Central R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Merchants &c. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Western &c. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Kansas Pac. R. Co. v. Reynolds, 17 Kans. 251; Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148; Michigan &c. R. Co. v. Hale, 6 Mich. 243; Levering v. Union &c. Co., 42 Mo. 88, 97 Am. Dec. 320; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Dorr v. New Jersey &c. Co., 11 N. Y. 485, 62 Am. Dec. 125; Nelson v. Hudson River R. Co., 48 N. Y. 498; Kirkland v. Dinsmore, 62 N. Y. 271; Schofield v. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

[15] Evans v. Railroad Co., 28 Ky. L. 834, 90 S. W. 588; Crescent Coal Co. v. Louisville &c. R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442; New England Exp. Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31; State v. Chicago &c. R. Co., 72 Nebr. 542, 101 N. W. 23; State ex rel. Luben v. Chicago &c. R. Co., 83 Nebr. 524, 120 N. W. 163; Strough v. Railroad Co., 92 App. Div. 584, 87 N. Y. S. 30; Memphis &c. Co. v. Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; Nichols v. Railroad Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778.

[16] This question is elsewhere discussed and we simply allude to the subject at this place. See Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717, citing and approving Newburger v. Howard, 6 Phila. (Pa.) 174; Hopkins v. Westcott, 6 Blatchf. (U. S.) 64; Ernest v. Express Co., 1 Woods (U. S.) 573; Muser v. Holland, 17 Blatchf. (U. S.) 412; South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Harvey v. Terre Haute &c. R.

§ 2202 (1455). **Act of God—What constitutes.**—As we have seen, the common law holds the common carrier exonerated in cases where the act of God is the proximate cause of the loss of goods entrusted to it for transportation. There is no diversity of opinion as to the rule that the act of God does exonerate the carrier,[17] in a proper case but there is conflict of opinion as to

Co., 74 Mo. 538; Oppenheimer v. United States &c. Co., 69 Ill. 62, 18 Am. Rep. 596; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Magnin v. Dinsmore, 56 N. Y. 168; Elkins v. Empire Transp. Co., 81 Pa. St. 315. Disapproving Southern &c. R. Co. v. Moon, 39 Miss. 822; United States &c. R. Co. v. Backman, 28 Ohio St. 144; Black v. Goodrich &c. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; Kansas City &c. R. Co. v. Simpson, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781. See also upon the general subject, Maxwell v. Southern &c. Co., 48 La. Ann. 385, 19 So. 287; Smith v. American &c. Co., 108 Mich. 572, 66 N. W. 479; Baltimore &c. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106.

[17] Maggie Hammond, The, 9 Wall. (U. S.) 435, 19 L. ed. 772; Pendall v. Rench, 4 McL. (U. S.) 259; Strouss v. Wabash &c. R. Co., 17 Fed. 209; Smith v. Western &c. R. Co., 91 Ala. 455, 8 So. 754, 24 Am. St. 929; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Converse v. Brainerd, 27 Conn. 607; Gleeson v. Virginia &c. R. Co., 5 Mack. (D. C.) 356; Richmond &c. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Pittsburgh &c. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. 316; Cleveland &c. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710; Gilbert Bros. v. Chicago &c. R. Co., 156 Iowa 440, 136 N. W. 911; Lewis v. Louisville &c. R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938, 21 Ann. Cas. 527; Emery v. Hersey, 4 Maine 407, 16 Am. Dec. 268; Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582; Hastings v. Pepper, 11 Pick. (Mass.) 41; Neal v. Saunderson, 2 Sneed. & M. (Miss.) 572, 41 Am. Dec. 609; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Black v. Chicago &c. R. Co., 30 Nebr. 197, 46 N. W. 428; Moses v. Norris, 4 N. H. 304; New Brunswick &c. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 396; Michaels v. New York &c. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Cobb v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; Duncan v. Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952; Livezey v. Philadelphia, 64 Pa. St. 106, 3 Am. Rep. 578; Philadelphia &c. R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; McClures v. Hammond, 1 Bay (S. Car.) 99, 1 Am. Dec. 598; Slater v. South Carolina R. Co., 29 S. Car. 96, 6 S. E. 936; Merchants' &c. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. 847; Day v. Ridley, 16 Vt. 48, 42 Am. Dec. 489; Murphy v. Staton,

what may be considered as the act of God. It may safely be said, however, that if there is any intervening human agency which contributes as a proximate cause to the production of the loss, the loss can not be considered as caused by the act of God in such a sense as to relieve the carrier from liability.[18] There may be accidents causing loss without fault or negligence on the part of the carriers, and still the carriers will be liable.[19] It is, however, quite well-settled that where the loss is caused by extraordinary and unprecedented storms, tempests, or the like, the carrier is exonerated unless some fault on its part concurred in producing the result.[20] Thus in one of the reported cases it was

3 Munf. (Va.) 239; Chesapeake &c. R. Co. v. Beasley &c. Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183; McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Strohn v. Detroit &c. R. Co., 23 Wis. 126, 99 Am. Dec. 114; Oregon &c. R. Co. v. Blyth, 19 Wyo. 410, 119 Pac. 875, Ann. Cas. 1913E, 288; Riley v. Horne, 5 Bing. 217, 15 E. C. L. 549; Fenwick v. Schmalz, L. R. 3 C. P. 313.

[18] Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 649; Hill v. Sturgeon, 28 Mo. 323; New Brunswick &c. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 396; McArthur v. Sears, 21 Wend. (N. Y.) 190; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Friend v. Woods, 6 Grat. (Va.) 189, 52 Am. Dec. 119; Trent Navigation v. Wood, 3 Esp. 127; Nugent v. Smith, L. R. 1 C. P. Div. 423; Oakley v. Portsmouth &c. Co., 11 Exch. 618; Forward v. Pittard, 1 T. R. 33. See generally Strouss v. Wabash &c. R. Co., 17 Fed. 209; Maggie Hammond, The, 9 Wall. (U. S.) 435, 19 L. ed. 772; The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. ed. 1039; Parker v. Flagg, 26 Maine 181, 45 Am. Dec. 101; Mershon v. Hobensack, 22 N. J. L. 372; Fairchild v. Slocum, 19 Wend. (N. Y.) 329; Miller v. Steam Navigation Co., 10 N. Y. 431; Graff v. Bloomer, 9 Pa. St. 114; Hays v. Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627; Faulkner v. Wright, Rice L. (S. Car.) 107; Chevallier v. Straham, 2 Tex. 115-125, 47 Am. Dec. 639; Gosling v. Higgins, 1 Camp. 451. See also Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252; Central of Ga. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170 (engineer insane); Arthur v. Texas &c. R. Co., 204 U. S. 505, 27 Sup. Ct. 338 (fire), 51 L. ed. 590.

[19] Forward v. Pittard, 1 T. R. 27; Hyde v. Trent &c. Co., 5 T. R. 389; American &c. Co. v. Moore, 5 Mich. 368; Hibler v. McCartney, 31 Ala. 501.

[20] Hibernia &c. Co. v. St. Louis Transportation Co., 120 U. S. 166, 7 Sup. Ct. 550, 30 L. ed. 621; Pearce v. Thomas Newton, The, 41 Fed. 106; Smith v. Western &c. R. Co., 91 Ala. 455, 8 So. 754, 11 L. R. A.

held that the carrier was not liable for loss caused by a sudden and extraordinary wind storm.[21] It has been held that a flood or freshet may be regarded as the act of God, although not unprecedented, if it was extraordinary and unexpected,[22] but we suppose that the carrier is not exonerated simply because the loss was caused by an unexpected flood.[23] An extraordinary and un-

619, 24 Am. St. 929; Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37; Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252; Wallace v. Clayton, 42 Ga. 443; Wald v. Pittsburgh &c. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332; Chicago &c. R. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869; Libby v. Maine Cent. R. Co., 85 Maine 34, 20 Atl. 943, 20 L. R. A. 812; Ballentine v. North Missouri &c. R. Co., 40 Mo. 491, 93 Am. Dec. 315; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; International Paper Co. v. New York Cent. R. Co., 100 Misc. 683, 166 N. Y. S. 751; Harris v. Norfolk &c. R. Co., 173 N. Car. 110, 91 S. E. 710; Long v. Railroad Co., 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732; Nashville &c. R. Co. v. King, 6 Heisk. (Tenn.) 269; Nashville &c. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594. Loss caused by an earthquake is attributable to the act of God. Slater v. South Carolina R. Co., 29 S. Car. 96, 6 S. E. 936. But see as to landslide, Gleeson v. Virginia &c. R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458.

[21] Blythe v. Denver &c. R. Co., 15 Colo. 333, 25 Pac. 702, 111 L. R. A. 615, and note, 22 Am. St. 403. In the case cited a car was blown from the track, a stove overturned, the coals thrown from the stove set fire to and consumed the goods, and it was held that the storm was the proximate cause of the loss. The court cited Insurance Co. v. Transportation Co., 12 Wall. (U. S.) 194, 20 L. ed. 378; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Insurance Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. See also as to snowstorm, Black v. Chicago &c. R. Co., 30 Nebr. 197, 46 N. W. 428.

[22] People v. Utica &c. Co., 22 Ill. App. 159; Smyrl v. Niolon, 2 Bail. (S. Car.) 421, 23 Am. Dec. 146; Fentiman v. Atchison &c. R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939.

[23] Gleeson v. Virgina &c. R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458; reversing Gleeson v. Virginia &c. R. Co., 5 Mack. (D. C.) 356. What is to be, or indeed what may be, expected, the carrier must guard against. Richmond &c. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Ferguson v. Southern Ry., 91 S. Car. 61, 74 S. E. 129; Atchison &c. R. Co. v. Madden &c. Co., 46 Tex. Civ. App. 597, 103 S. W. 1193.

precedented flood which causes a delay in transportation, resulting in the loss of perishable property, is such an act of God as will release the carrier from liability.[24] Where the immediate and sole cause of loss is the sudden and unanticipated action of the elements, as by freezing, the carrier is relieved from liability,[25] but if the fault of the carrier concurs he is not relieved.[26]

[24] Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Norris v. Savannah &c. R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. 355 (citing Read v. Spaulding, 30 N. Y. 630; Hall & Co. v. Renfro, 3 Metc. (Ky.) 51; Friend v. Woods, 6 Grat. (Va.) 189, 52 Am. Dec. 119; Maslin v. Baltimore &c. R. Co., 14 W. Va. 180, 35 Am. Rep. 748. See also Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Wald v. Pittsburgh &c. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332 (Johnstown flood); Wallace v. Clayton, 42 Ga. 443; Ohio Salt Co. v. Baltimore &c. R. Co., 204 Ill. App. 376; Hoadley v. Northern &c. Co., 115 Mass. 304, 15 Am. Rep. 106; Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Black v. Chicago &c. R. Co., 30 Nebr. 197, 46 N. W. 428; American &c. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Lipford v. Charlotte &c. R. Co., 7 Rich. L. (S. Car.) 409; Nashville &c. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594. In the case of St. Louis &c. R. Co. v. Bland (Tex. Civ. App.), 34 S. W. 675, the court held that it was error to instruct that the railroad company in constructing its road should have given heed to the history of previous floods within the memory of living men, as due care in locating and constructing the road may be shown, although no effort was made to obtain the history of previous floods.

[25] Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Empire &c. Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178; Beckwith v. Frisbie, 32 Vt. 559. See also White v. Minneapolis &c. R. Co., 111 Minn. 167, 126 N. W. 533. But freezing weather is to be expected at certain seasons in most latitudes and the carrier can seldom escape liability merely because goods are frozen during transit. See South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Cooper v. Raleigh &c. R. Co. 105 Ga. 83, 30 S. E. 731; St. Louis &c. R. Co. v. Dorman, 72 Ill. 504; Lindsley v. Chicago &c. R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. 692; Texas &c. R. Co. v. Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052.

[26] Milton v. Denver &c. R. Co., 1 Colo. App. 307, 29 Pac. 22. Upon the general subject of this section, the court in Bibb &c. Co. v. Atchison &c. R. Co., 94 Minn. 269, 102 N W. 709, 711, 69 L. R. A. 509, 110 Am. St. 361, said: "Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody

§ 2203 (1456). **Act of God—Express contract.**—Where there is an express contract to carry and deliver within a specified time and no limitations or qualifications therein, it is held that the carrier can not make available defenses founded upon causes arising from what is termed the act of God.[27] Where, however, there is no such express contract a different rule prevails and from a loss attributable to causes arising from the act of God the carrier may be exonerated.[28] A railroad carrier may enlarge its liability by contract, but it will not be deemed to have done so unless the provisions of the contract clearly indicate an intention to assume a greater liability than that imposed by law.[29]

for transportation resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If but for his negligence the loss would not have occurred no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force, which is attributable thereto, he should be held liable. Davis v. Garrett, 6 Bing. 716." See also Green &c. Shoe Co. v. Chicago &c. R. Co., 130 Iowa 123, 106 N. W. 498. These cases follow the New York doctrine, but the Massachusetts, Virginia, and some other courts exonerate the carrier in some instances at least, if the immediate cause of the injury was the act of God, notwithstanding the previous negligence of the carrier had subjected the property to such act. See editorials in New York Law Journal for Nov. 2, 1903, Feb. 5, 1904, March 27 and 29, 1905, and 62 Cent. L. J. 428; and post, § 2205.

[27] Miller v. Chicago &c. R. Co., 1 Mo. App. 474; Davis v. Smith, 15 Mo. 467; Collier v. Swinney, 16 Mo. 484; Harrison v. Missouri R. Co., 74 Mo. 364, 41 Am. Rep. 318; Harmony v. Burgham, 12 N. Y. 99, 62 Am. Dec. 142 and note. See also Central &c. R. Co. v. Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965.

[28] Miller v. Chicago &c. R. Co., 1 Mo. App. 474.

[29] Price v. Hartshorn, 44 Barb. 655, 44 N. Y. 94, 4 Am. Rep. 645; Gage v. Tirrell, 9 Allen (Mass.) 299. An unprecedented flood is within a provision of a bill of lading exempting a carrier from liability for any loss caused by the act of God, but it can not defend on

§ 2204 (1457). Burden on carrier to prove that act of God caused loss—Concurring negligence.—The burden is on the carrier who relies on the defense that the loss was caused by the act of God to affirmatively prove that the act of God was the cause of the injury or loss.[30] There is, however, a diversity of opinion upon the question whether the carrier is bound to supplement evidence that the loss was caused by the act of God by evidence that its own negligence or fault did not contribute to the injury. Some of the cases affirm that if the carrier shows that the loss was caused by the act of God he is excused,[31] while other cases

that ground if its own negligence actively co-operated in causing the loss. Porter &c. Mfg. Co. v. Central Vt. Ry. Co., 92 Vt. 1, 102 Atl. 44.

[30] Wertheimer v. Pennsylvania Co., 17 Blatchf. (U. S.) 421; Agnew v. Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87; Southern &c. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Van Winkle v. South Carolina R. Co., 38 Ga. 32; Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Denton v. Chicago &c. R. Co., 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263; Connie Glove Co. v. Transportation Co., 130 Iowa 327, 106 N. W. 749; Baltimore &c. Co. v. Brady, 32 Md. 333; Mayo v. Preston, 131 Mass. 304; Read v. St. Louis &c. R. Co., 60 Mo. 199; Davis v. Wabash &c. R. Co., 89 Mo. 340, 1 S. W. 327; Chicago &c. R. Co. v. Logan &c. Co., 230 Okla. 707, 105 Pac. 343, 29 L. R. A. (N. S.) 663; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Colton v. Cleveland &c. R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19. See generally Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co. (Ala.), 74 So. 232; Nashville &c. R. Co. v. Johnson, 60 Ind. App. 416, 106 N. E. 1087; Heyl v. Inman &c. Co., 14 Hun (N. Y.) 564; Lamb v. Camden &c. Transp. Co., 2 Daly (N. Y.) 454; Dunson v. New York &c. R. Co., 3 Lans. (N. Y.) 265; Beach v. Raritan &c. Co., 37 N. Y. 457; Lamb v. Camden &c. R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Condict v. Grand Trunk &c. R. Co., 54 N. Y. 500; Whitworth v. Erie R. Co., 87 N. Y. 413; Long v. Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732; Craig v. Childress, Peck (Tenn.) 270, 14 Am. Dec. 751.

[31] In Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909, the court said: "One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove affirmatively

hold that he must affirmatively show that there was no negligence or fault on his part.[32] If the fault or negligence of the carrier concurs or co-operates in causing the loss the rule that the act of God exonerates the carrier from liability will not apply, for the negligence of the carrier will be deemed the proximate cause of the loss.[33] The carrier is exonerated from liability only

that the cause was such as releases him and then to prove affirmatively that he did not contribute to it." See authorities cited in preceding note and see also Magnin v. Dinsmore, 56 N. Y. 168; J. C. Stevenson, The, 17 Fed. 540; Empire State Cattle Co. v. Atchison &c. R. Co., 135 Fed. 135, affirmed in 147 Fed. 457; Little Rock &c. R. Co. v. Corcoran, 40 Ark. 375; Rodgers v. Missouri Pac. R. Co., 75 Kans. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. 416, 12 Ann. Cas. 441; Northwestern Consol. Milling Co. v. Chicago &c. R. Co., 135 Minn. 363, 160 N. W. 1028; Jones v. Minneapolis &c. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; Wolf v. American &c. Co., 43 Mo. 421, 97 Am. Dec. 406.

[32] Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Grey v. Mobile &c. Co., 55 Ala. 387, 28 Am. Rep. 729; Richmond &c. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; Brown v. Adams &c. Co., 15 W. Va. 812. See also Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co. (Ala.), 74 So. 232; Chicago &c. R. Co. v. Collins Produce Co., 235 Fed. 857. See generally Pittsburgh &c. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735; Shriver v. Sioux City &c. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Ferguson v. Southern Ry., 91 S. Car. 61, 74 S. E. 129; Richmond &c. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202; Central of Ga. Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170; Central R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 47 Am. St. 37.

[33] Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Wolf v. American &c. Co., 43 Mo. 421, 97 Am. Dec. 406; Tuthill v. Norfolk &c. R. Co., 174 N. Car. 77, 93 S. E. 446; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54 and note; Columbia &c. Co. v. Bason, 1 Harp. L. (S. Car.) 262; Campbell v. Morse, 1 Harp. L. (S. Car.) 468; McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696. See generally Dunson v. New York &c. R. Co., 3 Lans. (N. Y.) 265; Thomas v. Wabash &c. R. Co., 62 Fed. 200, 4 Int. Com. 802; Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37; Peck v. Weeks, 34 Conn. 145; Wing v. New York &c. R. Co., 1 Hilt. (N. Y.) 235; Hart v. Allen, 2 Watts (Pa.) 114; Philleo v. Sanford, 17 Tex. 227, 67 Am. Dec. 654; Siordet v. Hall, 4 Bing. 607, 13 E. C. L. 657; Amies v. Stevens, 1 Stra. 128. See

in cases where the act of God is the proximate cause of the loss, and not where the act of God is a remote cause,[34] so that the burden is on the carrier to prove that the act of God was the proximate cause of the loss. Some of the authorities, indeed, require the carrier to show that the act of God was the sole cause of the loss.[35]

§ 2205 (1457a). Where carrier's negligence precedes act of God but there would otherwise be no loss.—As already shown,

also Chicago &c. R. Co. v. Collins Produce Co., 235 Fed. 857; Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Louisville &c. Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970; Baltimore &c. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643; Grier v. St. Louis &c. R. Co., 108 Mo. App. 565, 84 S. W. 158; Nelson v. Railway Co., 28 Mont. 297, 72 Pac. 642; Wabash R. Co. v. Sharpe, 76 Nebr. 424, 107 N. W. 758, 124 Am. St. 823; Feinberg v. Railroad Co., 52 N. J. L. 451, 20 Atl. 33; Adams Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202, 206 (citing text).

[34] Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Coosa &c. Co. v. Barclay, 30 Ala. 120; Steele v. McTyer, 31 Ala. 667, 70 Am. Dec. 516; McHenry v. Philadelphia &c. R. Co., 4 Harr. (Del.) 448; Chicago &c. R. Co. v. Shea, 66 Ill. 471; Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Merritt v. Earle, 31 Barb. (N. Y.) 38; McArthur v. Sears, 21 Wend. (N. Y.) 190; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Backhouse v. Sneed, 1 Mur. (N. Car.) 173; Sullivan c. Philadelphia &c. R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Hays v. Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627; Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666; Trent &c. Navigation v. Woop, 4 Doug. (Eng.) 287. See also Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202; Hutchinson v. United States Express Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393; Jones v. Railroad Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507.

[35] Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; McHenry v. Philadelphia &c. R. Co., 4 Harr. (Del.) 448; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292 and note; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Michaels v. New York &c. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Siordet v. Hall, 4 Bing. 607; Davis v. Garrett, 6 Bing. 716. See also Southern R. Co. v. Smith, 125 Ky. 656, 102 S. W. 232. But see Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Denny v. New York &c. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645. See generally 62 Cent. L. J. 228.

there is conflict among the authorities upon the question of remote and proximate cause, and upon that of the effect of the goods being subjected to the operation of the act of God by the antecedent negligence or delay of the carrier, and thus injured, when there would have been no loss if the goods had not thus been exposed by the carrier. Of course, if the carrier's negligence is concurrent, or proximately contributes to the loss, the carrier is liable; but it is held by a number of courts, where there has merely been delay, that, while it may be that the loss would not have occurred if there had been no delay, the intervention of the act of God immediately causing the loss, could not reasonably have been foreseen and was not to be anticipated by the carrier as a natural or probable consequence of the delay, so that the delay is not the proximate cause of the loss.[36] Other courts, fol-

[36] Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. Ed. 909. Gleeson v. Virginia &c. R. Co., 5 Mack. (D. C.) 356. See also Chicago &c. R. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869; Rodgers v. Missouri Pac. Ry. Co., 75 Kans. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. 416, 12 Ann. Cas. 441; Atchison &c. R. Co. v. Henry, 78 Kans. 490, 97 Pac. 465, 18 L. R. A. (N. S.) 177; Continental Paper Bag Co. v. Maine Cent. R. Co., 115 Maine 449, 99 Atl. 259; Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Hunt Bros. v. Missouri &c. R. Co. (Tex. Civ. App.), 74 S. W. 69. There has been a similar course of reasoning where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Yazoo &c. R. Co. v. Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. 543; General Fire Extinguisher Co. v. Carolina &c. R. Co., 137 N. C. 278, 47 S. E. 208. So, for like reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been foreseen or anticipated as the natural and probable consequence of such delay. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Herring v. Chesapeake &c. R. Co., 101 Va. 778, 45 S. E. 322. See also as following or approving this general doctrine, Moffatt &c. Co. v. Union Pac. R. Co., 113 Mo. App. 544, 88

lowing what is sometimes called the New York rule, hold that where the carrier is guilty of unreasonable delay, as well as in cases of deviation or other negligence, and it is shown that if it had not been for such delay the goods would have been delivered safely or carried beyond the reach of danger, and not subjected to the act that immediately caused the loss, the carrier is not exonerated or relieved from liability merely because the immediate cause of the loss was the act of God.[37] In strictness,

S. W. 117; Brier v. St. Louis &c. R. Co., 108 Mo. App. 565, 84 S. W. 158; Elam v. St. Louis &c. R. Co., 117 Mo. App. 453, 93 S. W. 851; Fentiman v. Atchison &c. R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939; International &c. R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 999; Herring v. Chesapeake &c. R. Co., 101 Va. 778, 45 S. E. 322; 5 Thomp. Neg. (2d ed.) § 6458; note in 36 Am. St. 838. And compare Northern Pac. R. Co. v. Kempton, 138 Fed. 992; Empire State Cattle Co. v. Atchison &c. R. Co., 135 Fed. 135; Pittsburgh &c. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. 316.

[37] The authorities are reviewed in the recent cases of Bibb &c. Co. v. Atchison &c. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. 361; and Green &c. Co. v. Chicago &c. R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, and we quote from the latter as follows: "It was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645, supra, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. And the same court has adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. Condict v. Grand Trunk R. Co., 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (Wald v. Pittsburg &c. R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332) and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. Michigan Cent. R. Co. v. Curtis, 80 Ill. 324. The Alabama and Kentucky courts have held that a destruction by fire within a valid exception in the bill of lading would not excuse carrier if by negligent delay in transportation the goods had been subjected to such casualty. Louisville &c. R. Co. v. Gidley, 119 Ala. 523, 24 So. 753; Hernsheim v. Newport News

it would seem that as the act of God, in such cases, is the immediate efficient cause, and is in its very nature extraordinary and unprecedented, it could not reasonably have been foreseen or anticipated, and it is, therefore the proximate cause rather than the delay; but, on the other hand, it is the duty of a common carrier to carry or forward the goods to their destination without unreasonable delay, and, it is argued that while the carrier could not, perhaps, have anticipated the particular act of God in question, yet it is well-known that extraordinary floods and storms have occurred and that goods have been injured or destroyed, or are liable to be injured or destroyed by such acts of God, even though unprecedented in the particular locality, and the carrier could foresee that negligent delay on its part would extend the time during which the goods would be liable to be overtaken by some such casualty, and it may therefore be said that it enhanced the peril of such loss by its negligent delay and breach of duty.[38]

&c. Co., 18 Ky. L. 227, 35 S.W. 1115. In Missouri the Supreme Court has followed or approved of what may be designated as the New York rule, under a variety of circumstances. Davis v. Wabash &c. R. Co., 89 Mo. 340, 1 S. W. 327; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527; Read v. St. Louis &c. R. Co., 60 Mo. 199. And the St. Louis Court of Appeals in that state has applied the same rule in case of a loss by freezing. Armentrout v. St. Louis &c. R. Co., 1 Mo. App. 158. . . . In West Virginia the Supreme Court has held that negligent delay renders the carrier liable for a subsequent loss by freezing. McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696." See also Central R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170; Alabama &c. R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. 54, 8 Ann. Cas. 308; Alabama &c. R. Co. v. Elliott, 150 Ala. 381, 43 So. 738, 9 L. R. A. (N. S.) 1264, 124 Am. St. 72; Wabash R. Co. v. Sharpe, 76 Nebr. 424, 107 N. W. 758, 124 Am. St. 823; Sunderland Bros. Co. v. Chicago &c. R. Co., 89 Nebr. 660, 131 N. W. 1047; Harris v. Norfolk &c. R. Co., 173 N. Car. 110, 91 S. E. 710.

[38] Green &c. Co. v. Chicago &c. R. Co., 130 Iowa 123, 106 N. W. 498, 500. But see Rodgers v. Missouri Pac. R. Co., 75 Kans. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. 416, 12 Ann. Cas. 441, in which the argument on this side is severely criticised, but not, perhaps, with entire fairness and justice. The Kansas court also reviews numerous authorities on both sides, and cites the following as sustaining its holding that the carrier is not liable: Railroad Company v. Reeves, 10 Wall. (U. S.)

So, if the carrier is liable, in such cases, where there is a wrongful

176, 19 L. Ed. 909. Freight not forwarded promptly overtaken by unprecedented flood. See also St. Louis &c. R. Co. v. Commercial Ins. Co., 139 U. S. 223, 237, 11 Sup. Ct. 554, 35 L. ed. 154; Empire State Cattle Co. v. Atchison &c. R. Co., 135 Fed. 135. Shipment of cattle delayed by negligence — loss at Kansas City by flood of 1903. In the opinion Pollock, District Judge, collates decisions of the federal courts. Lehman &c. Co. v. Pritchett, 84 Ala. 512, 4 So. 601. Delay in executing order to sell cotton—loss by fire. James v. James, 58 Ark. 157, 23 S. W. 1099, 41 Am. St. 95. Failure to gin cotton promptly —destruction by fire. Rodgers v. Central &c. R. Co., 67 Cal. 607, 8 Pac. 377. Defective bridge destroyed by cloud-burst. Dubuque &c. Assn. v. Dubuque, 30 Iowa 176. Delay in repairing bridge — wood waiting removal lost by flood. Dalzell v. Steamboat Saxon, 10 La. Ann. 280. Delay in carriage of goods — injury by sudden rise of river. Denny v. New York Central R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645. Delay in transporting wool—loss by flood. See also Hoadley v. Northern Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6. Delayed freight encountered freezing weather. See also Carnegie &c. Co. v. Holt, 99 Mich. 606, 58 N. W. 623; Wharfboat Assn. v. Wood & Co., 64 Miss. 661, 2 So. 76, 60 Am. Rep. 76; Yazoo &c. R. Co. v. Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. 543. Failure to ship cotton at first opportunity—loss by fire. Clark v. Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458. Transportation delayed —on arrival at destination goods destroyed by public enemy. Grier v. Railroad Co., 108 Mo. App. 565, 84 S. W. 158; Commission Co. v. Railroad Co., 113 Mo. App. 544, 88 S. W. 117; Elam v. St. Louis &c. R. Co., 117 Mo. App. 453, 93 S. W. 851. These cases involve losses consequent upon the Kansas and Missouri river floods of 1903. McVeagh & Co. v. Atchison &c. R. Co., 3 Johns. (N. M.) 205, 5 Pac. 457. Failure to forward goods—seizure on legal process. Extinguisher Co. v. Railroad, 137 N. Car. 278, 49 S. E. 208. Negligent failure to forward goods — loss by fire. Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264 and note. Tug towing barge suspended voyage—after voyage resumed barge destroyed by storm. Morrison v. Davis & Co., 20 Pa. 171, 57 Am. Dec. 695. Canal boat drawn by lame horse wrecked by a flood. See also Jones v. Gilmore, 91 Pa. 310; Lamont & Co. v. Nashville &c. R. Co., 9 Heisk. (Tenn.) 58. Neglect to forward goods promptly—loss by flood. Gulf &c. R. Co. v. Darby, 28 Tex. Civ. App. 229, 67 S. W. 129; International &c. R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 999. Delay in delivering shipment of wheat—loss by great storm at Galveston. Davis v. Central &c. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852. Delay in forwarding grain stored in defend-

deviation on its part, as is generally held,[39] it is difficult to see why it should be excused where it has committed a breach of its duty by unreasonable delay. As we have seen, however, plausible reasons are urged in support of each view, and the authorities seem to be in irreconcilable conflict. But it is clear that where the negligence of the carrier mingles as a proximate cause with the act of God and the resulting loss is a probable consequence of such negligence, as where the carrier was aware of an extraordinary flood or the like in time to have saved the goods by the exercise of ordinary care and diligence, the carrier is liable for the resulting loss.[40]

§ 2206 (1458). Public enemies.—The term "public enemies" means those with whom the country is at war, and does not include thieves, rioters or mere insurgents.[41] Where, however, the insurgents have so gathered strength as to involve the country in a civil war they are regarded as public enemies.[42] It is not necessary in order to constitute persons in arms against the gov-

ant's elevator — elevator burned. Herring v. Chesapeake &c. R. Co., 101 Va. 778, 45 S. E. 322. Delay in transporting stock—damage by exceptional snow and cold.

[39] See Davis v. Garrett, 6 Bing. 716; Dunbetti, The, L. R. (1897), P. 133; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Seavey v. Transit Co., 106 Wis. 394, 82 N. W. 285; Chicago &c. R. Co. v. Dunlap, 71 Kans. 67, 80 Pac. 34.

[40] Pinkerton v. Missouri Pac. R. Co., 117 Mo. App. 288, 93 S. W. 849; Davis v. Davis &c. R. Co., 89 Mo. 347, 1 S. W. 327. See also Savannah &c. R. Co. v. Commercial Guam Co., 103 Ga. 590, 30 S. E. 555; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642.

[41] Coggs v. Bernard, 2 Ld. Raym. 909; Gage v. Tirrell, 9 Allen (Mass.) 299; Seligman v. Armijo, 1 N. Mex. 459; Hall v. Railroad Co., 14 Phila. (Pa.) 414. See also Pittsburgh &c. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Hutchinson v. United States Express Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393.

[42] United States v. Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; Mauran v. Ins. Co., 6 Wall. (U. S.) 1, 18 L. ed. 836; Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361; Holladay v. Kennard, 12 Wall. (U. S.) 254, 20 L. ed. 390; Bland v. Adams &c. Co., 62 Ky. 232, 85 Am. Dec. 623; McCranie v. Wood, 24 La. Ann. 406; Philadelphia &c. R. Co. v. Harper, 29 Md. 330; Nashville &c. R. Co. v. Estes, 10 Lea (Tenn.) 747; Southern &c. Co. v. Womack, 1 Heisk. (Tenn.) 256 (pirates); Nesbitt v. Lushington, 4 T. R. 783.

ernment public enemies that there should be formal or open declaration of war, for if there be an actual state of war those engaged against the government are public enemies.[43] It is the duty of the carrier to use due care and diligence to prevent the capture or destruction of goods by public enemies, and although the carrier is not liable when the loss is caused by the act of public enemies simply because of the loss, it is liable if its negligence contributed to the loss.[44] The principle which supports the rule that the burden of proof is on the carrier to show that the loss was caused by the act of God requires that it be held that the burden is on the carrier who claims exoneration on the ground that the loss was caused by public enemies to prove that fact. We are inclined to the opinion that where the carrier defends upon the ground that the loss was caused by the public enemies it must supplement evidence that it was so caused by evidence that its negligence did not contribute to the loss, for the course pursued by it must be a matter peculiarly within its own knowledge.

§ 2207 (1459). Public enemies—Mobs—Strikes.—Under the ancient rule the carrier was responsible for the loss of goods although the loss or injury was caused by the acts of mobs or riotous law breakers.[45] The general doctrine still prevails, although it has been greatly modified by the modern decisions. The weight of authority now is, that, while the violent acts of a mob may not exonerate the carrier where the goods are destroyed,[46] such acts may exonerate the carrier from liability for

[43] Prize Cases, The, 2 Black. (U. S.) 635, 17 L. ed. 459; Alexander's Cotton, 2 Wall. (U. S.) 404, 17 L. ed. 915.

[44] Holladay v. Kennard, 12 Wall. (U. S.) 254, 20 L. ed. 390. See also Southern Exp. Co. v. Womach, 1 Heisk. (Tenn.) 256; Express Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. ed. 457.

[45] Coggs v. Bernard, 2 Ld. Raym. 909; Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639; Forward v. Pittard, 1 T. R. 27; Patton v. Magrath, Dud. L. (S. Car.) 159, 31 Am. Dec. 552; Swindler v. Hilliard, 2 Rich. L. (S. Car.) 286, 45 Am. Dec. 732. For a strong statement of the rule, see McArthur v. Sears, 21 Wend. (N. Y.) 190.

[46] Hall v. Pennsylvania R. Co.,

loss resulting from delay.[47] The doctrine just stated is applied although the mob is composed of employes of the company who have engaged in a strike,[48] but we suppose that the acts of the strikers must be of such a character as to prevent the operation of the road, and that the company will not be exonerated from

14 Phila. (Pa.) 414; Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 46 Am. St. 209, 28 L. R. A. 80. See also Pittsburgh &c. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. 316.

[47] Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Haas v. Kansas City &c. R. Co., 81 Ga. 792, 7 S. E. 629, 35 Am. & Eng. R. Cas. 572; Pittsburg &c. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Pittsburgh &c. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Lake Shore &c. R. Co. v. Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 402; Bartlett v. Pittsburg &c. R. Co., 94 Ind. 281; Little v. Fargo, 43 Hun (N. Y.) 233; Geismer v. New York &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837; Hamilton v. Western &c. R. Co., 96 N. Car. 398, 3 S. E. 164; Lang v. Pennsylvania R. Co., 154 Pa. St. 242, 26 Atl. 370, 20 L. R. A. 360, 35 Am. St. 846; Gulf &c. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45; Hick v. Rodocanachi, L. R. (1891) 2 Q. B. 626. See Mr. Freeman's note to Norris v. Savannah &c. R. Co., 11 Am. St. 355, 365; Louisville &c. R. Co. v. Queen City &c. Co., 99 Ky. 217, 35 S. W. 626; Texas &c. R. Co. v. Langbehn (Tex. Civ. App.), 150 S. W. 1188. But it is held that refusal or failure of a common carrier to perform its duty is not excused by the fact that a strike on another road will be extended to it if it does so. Chicago &c. R. Co. v. Burlington &c. R. Co., 34 Fed. 481. And it is held that the mere declaration of martial law in a district will not relieve a common carrier of all liability to the shipper. Chicago &c. R. Co. v. Collins Produce Co., 235 Fed. 857.

[48] Southern &c. R. Co. v. Johnson, 4 Willson Civ. Cas. Ct. App. (Tex.) § 45, 15 S. W. 121, 45 Am. & Eng. R. Cas. 338; Southern &c. R. Co. v. Stell (Tex.), 15 S. W. 122; International &c. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545. Some of the cases make the distinction between cases where the rioters are employes and cases where they are strangers. Indianapolis &c. R. Co. v. Juntgen, 10 Bradw. (Ill. App.) 295; Wertheimer v. Pennsylvania Co., 17 Blatchf. (U. S.) 421; Sherman v. Pennsylvania Co., 1 Fed. 226, 3 Am. & Eng. R. Cas. 274. We think that there is no sufficient reason for the distinction, for where the mob is such that the public authorities can not quell it and the carrier exercises due care and diligence by making reasonable efforts to move its trains there is no just reason for holding the carrier liable for damages resulting from delay.

liability unless it exercises care and diligence to move its trains, for the duty of exercising care rests upon the carrier under all circumstances,[49] but what constitutes sufficient care and diligence to relieve the carrier must depend upon the facts of the particular case. Due diligence requires that proper effort should be made to supply the place of striking employes and to secure the movement of trains.[50] In one of the cases where delay was caused by the acts of striking employes of one of the connecting carriers, the carrier deviated from the prescribed route, but did so without informing the consignor, the property (potatoes) was taken back to one of the places on the route and sold, and it was held that while an unforeseen necessity might justify a deviation the carrier was liable because it had not consulted the owner of the property.[51]

§ 2208. (1460). **Mobs—Violence of does not relieve where there is an express contract.**—The authorities require the conclusion that where there is an express contract wherein the carrier undertakes, without limitation or qualification, to safely carry and deliver within a time definitely fixed by the contract, the fact that a mob prevents the carrier from performing the contract will not exonerate it from liability for loss of the goods. The theory of the decisions is that the carrier, if it desires to avail itself of the acts of mobs as a ground of defense must so stipulate in the contract under which it undertakes to carry the

[49] Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Blackstock v. New York &c. R. Co., 20 N. Y. 48, 75 Am. Dec. 372; Geismer v. Lake Shore &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837; Pittsburg &c. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422.

[50] Central &c. Co. v. Georgia &c. Exch., 91 Ga. 389, 17 S. E. 904, 55 Am. & Eng. R. Cas. 606. See also Pittsburgh &c. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; People v. New York Cent. &c. R. Co., 28 Hun (N. Y.) 543, 9 Am. & Eng. R. Cas. 1; Gulf &c. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45; Sherman v. Pennsylvania R. Co., Fed. Cas. No. 12,769.

[51] Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820, citing Louisville &c. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253. The same doctrine is laid down in Alabama &c. R. Co. v. Brichetto, 72 Miss. 891, 18 So. 421, in which it is held that the carrier must usually notify the shipper in case of delay due to a strike.

property. A distinction is made between cases where there is no express contract to carry and deliver within a limited time and cases where there is such an express contract.[52]

§ 2209 (1461). Public authority—When exercise of exonerates carriers.—Railroad carriers, as are all persons artificial or natural, are bound to yield obedience to the law. They have neither the right, nor, in the true sense, the power to disregard the law or defy the public authority. In yielding to the law and its ministers they yield to necessity, and "necessity privileges a person acting under its influence." If there is no fault of the carrier contributing to the loss or destruction of goods accepted by it for transportation, it is exonerated from liability where the goods are taken from it or are lost or destroyed by public authority.[53] But if the wrong of the carrier contributes to the

[52] Gulf &c. R. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; Gulf &c. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45; Missouri &c. R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410. See also Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Ward v. New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405.

[53] Bliven v. Hudson River R. Co., 36 N. Y. 403, 407; Wells v. Main &c. Co., 4 Cliff. (U. S.) 228, Fed. Cases, 17, 401; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 500, 32 N. E. 476, 21 L. R. A. 117, and notes, 34 Am. St. 579; Atkinson v. Ritchie, 10 East 530; Bliven v. Hudson River &c. R. Co., 35 Barb. (N. Y.) 188. See Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346; Stiles v. Davis, 1 Black (U. S.) 101, 17 L. ed. 33; Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; Railroad Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; Jonesboro &c. R. Co. v. Adams, 117 Ark. 54, 174 S. W. 527 (also where shipment was unlawful); Indiana &c. R. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. 264; Cleveland &c. R. Co. v. Wright, 25 Ind. App. 525, 58 N. E. 559; Clifford v. Brockton Transp. Co., 214 Mass. 466, 101 N. E. 1092; Santa Fe &c. R. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977; Pingree v. Detroit &c. R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; Gulf &c. R. Co. v. Belton Oil Co., 45 Tex. Civ. App. 44, 99 S. W. 430; note in 21 L. R. A. (N. S.) 731. It has been held that process issued under an unconstitutional statute will protect the carrier. McAlister v. Chicago &c. R. Co., 74 Mo. 351. See also Southern Express Co. v. Sottile Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139, 144 (citing text).

loss it will not be exonerated. If the legal proceedings be had at the instance, or, as it is held, with the convenience of the carrier they will not protect it.[54] The proceedings in order to protect the carrier must, at least, appear to be valid, since no protection is afforded by proceedings that have not the appearance of validity.[55] And it has been held that a common carrier, after accepting freight for shipment from one state to another, is not required to forego the right to ship it and receive compensation therefor by the service of a garnishee summons, in a suit by a third party against the owner of the goods, and is not excused from its duty to do so where the goods have already been received and placed in its car and a bill of lading has been issued therefor.[56] Where proceedings are taken against the carrier it must, with promptness, diligence and care, give the owner notice thereof.[57] But if it gives such notice and the proceedings are regular it is not obliged to defend the action and incur expense or liability.[58]

§ 2210 (1462). **When the liability of the company as a common carrier attaches.**—The liability of a railroad company as a common carrier does not attach until the goods have come into its hands in its capacity of a carrier.[59] Thus, the fact that a rail-

[54] Robinson v. Memphis &c. R. Co., 16 Fed. 57.

[55] Jewett v. Olsen, 18 Ore. 419, 23 Pac. 262, 17 Am. St. 745; Nickey v. St. Louis &c. R. Co., 35 Mo. App. 79; Bennett v. American Express Co., 83 Maine 236, 22 Atl. 159, 23 Am. St. 774. See also Edwards v. Transit Co., 104 Mass. 159, 6 Am. Rep. 213; Merz v. Railway Co., 86 Minn. 33, 90 N. W. 7.

[56] Baldwin v. Great Northern R. Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. 370. See also Stevenot v. Eastern R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600. And compare Haase &c. Fish Co. v. Merchants &c. Transp. Co., 143 Mo. App. 42, 122 S. W. 362.

[57] Kiff v. Old Colony &c. R. Co., 117 Mass. 591, 19 Am. Rep. 429; Ohio &c. R. Co. v. Yohe, 51 Ind. 181; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. 579. See generally Faust v. South Car. &c. R. Co., 8 S. Car. 118; Mierson v. Hope, 2 Sween. (N. Y.) 561; Robinson v. Memphis &c. R. Co., 16 Fed. 57.

[58] Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749, Ann. Cas. 1916B, 1217.

[59] We are not here considering

road company entered into a contract to reship goods from a place to which they had been carried by mistake of the shipper does not of itself fasten upon the company the duty or liability of a common carrier of goods, and it is not responsible for the loss of such goods by fire while in a warehouse awaiting reshipment.[60] It has been held, however, that where goods are in the possession of a railroad company as a warehouseman, and have been in such possession for some time, and while in its possession it receives, but does not obey instructions to ship them, its liability as a common carrier attaches at the time it receives the directions to ship the goods.[61] In another case it was held that where goods were stored in the warehouse of a railroad company by a shipper to be transported from time to time, the liability of the company as a common carrier did not attach until the goods were set apart for shipment.[62] But it is

the duty to accept and carry, but refer rather, in this connection to the duties and liabilities of the carrier where it undertakes to carry the particular goods. See, generally, as to when there is a complete delivery, note in 97 Am. St. 84, et seq.

[60] Ante, § 2116; Treleven v. Northern &c. R. Co., 89 Wis. 598, 62 N. W. 536. See Stewart v. Gracy, 93 Tenn. 314, 27 S. W. 664. In the case last cited the court distinguished the cases of Deming v. Merchants' &c. Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Watson v. Memphis &c. R. Co., 9 Heisk. (Tenn.) 255, saying: "But in the case at bar the tobacco was not deposited with an agent of the carriers, but it was left in the custody of an agent of the shipper and constructively in the possession of the shipper himself. The carriers in this case did not execute a bill of lading or receipt for the property, nor did they in any way acknowledge that the property was in their custody." See also St. Louis &c. R. Co. v. Citizens' Nat. Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17.

[61] Schmidt v. Chicago &c. R. Co., 90 Wis. 504, 63 N. W. 1057. The court held that: "The more stringent liability of a common carrier attaches whenever the immediate duty of transportation arises." Barron v. Eldredge, 100 Mass. 455. See also St. Louis &c. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202.

[62] Milloy v. Grand Trunk &c. R. Co., 21 Ont. App. 404. See also Leigh v. Smith, 1 Car. & P. 638; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 1 Sup. Ct. 1132, 30 L. ed. 1077; Railway Co. v. Bank, 112 Fed. 861, 56 L. R. A. 546; Frazier v. Kansas City &c. R. Co., 48 Iowa 571; Missouri Pac. R. Co. v. Riggs, 10 Kans. App. 578, 62 Pac. 712; Stapleton v. Grand Trunk &c. R. Co., 133 Mich. 187,

held that where goods are delivered to a railroad company for immediate shipment, and the company, for its own convenience and because it has no cars in which to transport the goods, places them in its warehouse, it is liable as a common carrier and not simply as a warehouseman.[63] The duty of a railroad company as a common carrier begins when it accepts goods for transportation and is placed in complete control of them for the purpose of transporting them, although it may not issue a formal receipt or bill of lading for them.[64]

94 N. W. 739; Grosvenor v. Railroad, 39 N. Y. 34; American Lead Pencil Co. v. Nashville &c. Ry. Co., 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323; Selway v. Holloway, 1 Ld. Raym. 46.

[63] London &c. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752, 61 Am. & Eng. R. Cas. 225. In the case cited it was said: "The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (coinstante) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward, for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put in itinere." The cases of Judson v. Western R. Co., 4 Allen (Mass.) 520, 81 Am. Dec. 718; Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Grosvenor v. New York &c. R. Co., 39 N. Y. 34; O'Neill v. New York &c. R. Co., 60 N. Y. 138, were cited. The case of Wilson v. Atlanta &c. R. Co., 82 Ga. 386, 9 S. E. 1076, was distinguished. See also Meloche v. Railway Co., 116 Mich. 69, 74 N. W. 301; Gregory v. Wabash R. Co., 46 Mo. App. 574. But compare St. Louis, I. M. & S. R. Co. v. Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154; Arthur v. Texas &c. R. Co., 139 Fed. 127.

[64] Montgomery &c. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; St. Louis &c. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Illinois &c. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296; Rogers v. Wheeler, 52 N. Y. 262; O'Neill v. New York &c. R. Co., 60 N. Y. 138; London &c. Co. v. Rome &c. R. Co., 68 Hun 598, 23 N. Y. S. 231; Wells v. Wilmington &c. R. Co., 51 N. Car. 47. See generally Pittsburgh &c. R. Co. v. Barrett, 36 Ohio St. 448; Trowbridge v. Chapin, 23 Conn. 595; Galena &c. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Packard v. Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; Bryan v. Louisville &c. R. Co., 174 N. Car. 177, 93 S. E. 750; Dionne v. American Exp. Co., 91 Vt. 521, 101 Atl. 209 (and even though the carrier's instructions to the agent require a receipt); ante, §§ 2115, 2116.

§ 2211 (1463). **Railroad company as a warehouseman—General doctrine.**—The rule is that a railroad company is not held to the extraordinary duty and liability of a common carrier unless it has custody or control of the property in its capacity as such carrier, and this doctrine applies to a railroad company in possession of property in the capacity of a warehouseman. Where the company holds possession of property as a warehouseman it is not an insurer, and it is not liable unless it appears that its negligence contributed to the loss of the property.[65] It is, of course, a bailee, and under a duty to exercise ordinary care and diligence, but it is under no greater duty. If the goods are held merely as a warehouseman by the company, no recovery can be obtained against it unless it was guilty of a breach of duty in failing to exercise ordinary care and diligence.[66] If the duty as a carrier has terminated, and that of a warehouseman attached, the company is still liable for the wrongful acts of its employes acting within the scope of their employment. Thus, where goods are carried to their destination and notice given, the company is, nevertheless, responsible for the loss of goods if its employes give incorrect information to the consignee which so misleads him as to prevent him from removing the goods.[67] So, where

[65] Ante, § 2117. See also Hogan Milling Co. v. Union Pac. R. Co., 91 Kans. 783, 139 Pac. 397; Burnell v. New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Carroll v. Southern Exp. Co., 37 S. Car. 452, 16 S. E. 128.

[66] Chicago &c. R. Co. v. Jenkins, 103 Ill. 588; Lane v. Boston &c. R. Co., 112 Mass. 455; Stowe v. New York &c. R. Co., 113 Mass. 521; Morris &c. R. Co. v. Ayers, 29 N. J. L. 393, 80 Am. Dec. 215; Neal v. Wilmington &c. R. Co., 8 Jones L. (N. Car.) 482; Galveston &c. R. Co. v. Smith (Tex. Civ. App.), 28 S. W. 110; Mitchell v. Lancashire &c. R. Co., L. R. 10 Q. B. 256; Hudson v. Baxendale, 2 Hurls. & N. 575. See also Southern R. Co. v. Aldridge, 142 Ala. 368, 38 So. 805; Adix v. Chicago &c. R. Co., 150 Iowa 379, 130 N. W. 162, 37 L. R. A. (N. S.) 558; Stoddard Lumber Co. v. Oregon &c. R. &c. Co., 84 Ore. 399, 165 Pac. 363, 4 A. L. R. 1275, 1278 (citing text); Hurley & Son v. Norfolk &c. R. Co., 68 W. Va. 471, 69 S. E. 904.

[67] Central &c. Co. v. East Tennessee &c. R. Co., 70 Fed. 764 (citing Butler v. East Tennessee &c. R. Co., 8 Lea (Tenn.) 32; East Tennessee &c. R. Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. 902); Richmond &c. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446; Jeffersonville &c. R.

the employes of the company violate a promise to the owner and ship the goods contrary to his directions, it has been held that a wrong is committed which renders the company liable for the loss of the goods by an accidental fire.[68] The rule that the company, in its capacity as a warehouseman, is not liable except where its negligence contributes to the loss, protects it from liability for goods destroyed by an accidental fire,[69] unless its breach of duty or of contract contributes to the loss, and it is only upon the ground that there is a breach of duty that the cases cited in the notes can be supported. It seems to us, although there is conflict upon the question, that where the company shows safe carriage of goods to their destination and performance of its duty as a carrier, the burden of proving negligence is on the plaintiff.[70] We do not mean to be understood as saying that the burden is on the plaintiff to show that the duty of the company as a carrier has terminated[71] (we do not here consider the question as to who has the burden in cases where the carrier's liability is limited by contract), for we are here speaking of the rule where that duty has terminated and the duty of a ware-

Co. v. Cotton, 29 Ind. 498, 95 Am. Dec. 656; Burlington &c. R. Co. v. Arms, 15 Nebr. 69, 17 N. W. 351; Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; Berry v. West Va. &c. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781. The general doctrine stated in the text has been applied to the loss of a passenger's baggage. Kansas City &c. R. Co. v. Morrison, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252, citing Atchison &c. R. Co. v. Brewer, 20 Kans. 669; Chicago &c. R. Co. v. Conklin, 32 Kans. 55, 3 Pac. 762. The doctrine is probably somewhat too broadly stated in some of the Kansas cases.

[68] Campion v. Canadian &c. R. Co., 43 Fed. 775. See also Thomas v. Lancaster Mills, 71 Fed. 481.

[69] Pindell v. St. Louis &c. R. Co., 41 Mo. App. 84; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709. See also Hogan Milling Co. v. Union Pac. R. Co., 91 Kans. 783, 139 Pac. 397; Murphy v. Southern Ry., 77 S. Car. 76, 57 S. E. 664.

[70] Guiding Star, The, 53 Fed. 936; Lyndsay v. Connecticut &c. R. Co., 27 Vt. 643; Chenowith v. Dickinson, 8 B. Mon. (Ky.) 156; Morehead v. Brown, 6 Jones (N. Car.) 367; Buckeye, The, 7 Biss. (U. S.) 23. See New Orleans &c. R. Co. v. Faler, 58 Miss. 911; Russell Manufacturing Co. v. New Haven Steamboat Co., 50 N. Y. 121.

[71] It has been held that the carrier has this burden. Kirk v. Chicago &c. R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397.

houseman attached. There is, as we believe, reason for discriminating between the classes of cases mentioned, but there is authority supporting the proposition that the burden is on the railroad company to disprove negligence.[72] It is, of course, true that where there is a complete delivery to the company in its capacity of a common carrier, and it holds the goods as such, no question of negligence arises except in cases where there is a contract limiting its liability.[73] In cases of accidental fires, some of the courts, as against carriers, trench somewhat upon the rule that there can be no recovery unless the negligence is the proximate cause of the injury, and it is hardly too much to say that some of the cases declare an anomalous rule peculiar to carriers,[74] for they unquestionably extend the relation of cause and effect beyond that required to authorize a recovery in other cases where the right of recovery is based upon negligence. The doctrine of proximate cause has, of course, comparatively little force where the liability is strictly the extraordinary one of a common carrier,[75] but it is difficult to perceive why it should not prevail where the

[72] Wilson v. California &c. R. Co., 94 Cal. 166, 17 L. R. A. 685. See also Oderkirk v. Fargo, 61 Hun 418, 16 N. Y. S. 220; Diamond Joe Line v. Carter, 76 Ill. App. 470; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Hudson v. Baxendale, 2 Hurl. & N. 575; Kremer v. Southern &c. Co., 6 Cold. (Tenn.) 356; Fisk v. Newton, 1 Denio (N. Y.) 45; Neal v. Wilmington &c. R. Co., 8 Jones L. (N. Car.) 482.

[73] Pearce v. Thomas Neuton, The, 41 Fed. 106; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Bulkley v. Naumkeag &c. Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; Schooner Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341. See generally Vandewater v. Mills, 19 How. (U. S.) 82, 15 L. ed. 554; Hermitage, The, 4 Blatchf. (U. S.) 474; Keokuk, The, 9 Wall. (U. S.) 517, 19 L. ed. 744; Scott v. Ira Chaffee, The, 2 Fed. 401; City of Baton Rouge, The, 19 Fed. 461; Missouri, The, 30 Fed. 384.

[74] East Tennessee &c. R. Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691 and note, 30 Am. St. 902 (distinguishing Lamont v. Nashville &c. R. Co., 9 Heisk. (Tenn.) 58, and citing Deming v. Merchants' &c. Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518 and note. But see Railway Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Lancaster Mills v. Merchants' &c. Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; and see post, § 2237.

[75] Richmond &c. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446.

liability is that of a warehouseman and not that of a carrier of things.[76]

§ 2212 (1464). **When the liability of a railroad company is that of a warehouseman.**—Goods may be received under a contract, express or implied, by a railroad company in the capacity of a warehouseman. It is obvious that where there is an express contract there can be very little question as to the nature of the liability, but there is sometimes difficulty, in cases where there is no such contract, in determining whether the goods are held by the company in the capacity of a warehouseman or in that of a common carrier. Ordinarily, where goods are received for the purpose of being stored until ready for transportation, they are in the possession of the company as a warehouseman,[77] but if received and accepted for transportation, that is, if there is a complete delivery to the company for transportation, it is held to have possession of the goods in its capacity of a common carrier.[78]

[76] See Hogan Milling Co. v. Union Pac. R. Co., 91 Kans. 783, 139 Pac. 397.

[77] Basnight v. Atlantic &c. R. Co., 111 N. Car. 592, 16 S. E. 323; Michigan &c. Co. v. Schurtz, 7 Mich. 515; Judson v. Western &c. R. Co., 86 Mass. 520, 81 Am. Dec. 718; Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Pittsburgh &c. R. Co. v. Barrett, 36 Ohio St. 448. Compare also St. Louis &c. R. Co. v. Citizens' Nat. Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. 17; Dunnington v. Louisville &c. R. Co., 153 Ky. 388, 155 S. W. 750; Schmidt v. Chicago &c. R. Co., 90 Wis. 504, 63 N. W. 1057; Louisville &c. R. Co. v. United States, 39 Ct. Cl. (U. S.) 405.

[78] Gregory v. Wabash &c. R. Co., 46 Mo. App. 574; Ackley v. Kellogg, 8 Cow. (N. Y.) 223; London &c. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752, 61 Am. & Eng. R. Cas. 225; Schmidt v. Chicago &c. R. Co., 90 Wis. 504, 63 N. W. 1057; Milloy v. Grand Trunk &c. R. Co., 21 Ont. App. 404; Garside v. Trent &c. Navigation, 4 T. R. 581; ante, § 2117. See also St. Louis &c. R. Co. v. Cavender, 170 Ala. 601, 54 So. 54; Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739; Fisher v. Lake Shore &c. R. Co., 17 Ohio Cir. Ct. 491, 90 C. D. 413. What constitutes a complete delivery to a carrier is defined in Merriam v. Hartford &c. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Packard v. Gatman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475. As to delivery to a subordinate employe, see Minter v. Pacific &c. R. Co., 41 Mo. 508, 97 Am. Dec. 288.

The general rule is that, when the goods have been carried to their destination, reasonable opportunity allowed the owner to remove them, and proper notice given in cases where notice is required, as it is in some jurisdictions, but not all, the duty of the company as a common carrier terminates, and that of a warehouseman begins.[79] There is, indeed, no substantial di-

[79] Southern Express Co. v. Holland, 109 Ala. 362, 19 So. 66; Denver &c. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578, 97 Am. St. 76 and note; Southwestern R. Co. v. Felder, 46 Ga. 433; Western &c. R. Co. v. Camp, 53 Ga. 599; Gregg v. Illinois &c. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Bassett v. Connecticut &c. R. Co., 145 Mass. 129, 13 N. E. 370, 1 Am. St. 443; Blaisdell v. Connecticut &c. R. Co., 145 Mass. 132, 13 N. E. 373; Stanard &c. Co. v. White Line &c. Co., 122 Mo. 258, 26 S. W. 704; Moses v. Boston &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Moses v. Boston &c. R. Co., 32 N. H. 523, 64 Am. Dec. 381; Texas &c. Ry. Co. v. Patterson (Tex. Civ. App.), 192 S. W. 585; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773; Wood v. Milwaukee &c. R. Co., 27 Wis. 541, 9 Am. Rep. 465; Lemke v. Chicago &c. R. Co., 39 Wis. 449; Backhaus v. Chicago &c. R. Co., 92 Wis. 393, 66 N. W. 400; Mitchell v. Lancashire &c. R. Co., L. R. 10 Q. B. 256; Bourne v. Gatliffe, 7 Man. & G. 850; Chapman v. Great Western &c. R. Co., L. R. 5 Q. B. Div. 278; Crouch v. Great Western &c. R. Co., 27 L J. Exch. 345; Heugh v. London &c. R. Co., L. R. 5 Exch. 51; Byrne v. Boadle, 2 Hurlst. & C. 722. See generally State v. Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; Bansemer v. Toledo &c. R. Co., 25 Ind. 434, 87 Am. Dec. 367; Cincinnati &c. R. Co. v. McCool, 26 Ind. 140; Merchants' &c. Co. v. Merriam, 111 Ind. 5, 11 N. E. 954; Francis v. Dubuque &c. R. Co., 25 Iowa 60, 95 Am. Dec. 769; Independence &c. Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; McMahon v. Davidson, 12 Minn. 357; Pindell v. St. Louis &c. R. Co., 41 Mo. App. 84; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Farmers' Mercantile Co. v. Northern Pac. Ry. Co., 27 N. Dak. 302, 146 N. W. 550. This subject is considered, and the conflicting authorities are classified in § 2297, post. It has been held that the law of the place where the contract to carry is made governs as to when the liability as carrier ceases and that of warehouseman begins. Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574. Upon the principle stated in the text the duty to passengers who leave their baggage at the station after the arrival of the train and a reasonable time in which to remove it is that of a warehouseman. Nealand v. Boston &c. R. Co., 161 Mass. 67, 36 N. E. 592; Ditman &c. Co. v. Keokuk &c. R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. 352; Goodbar v. Wabash &c. R. Co., 53 Mo. App. 434; Kan-

versity of opinion upon the proposition as we have stated it, but there is stubborn conflict as to whether the extraordinary liability terminates until the consignee has had notice and reasonable opportunity to remove the goods. Notice to the consignee is held by some of the courts to be necessary to terminate the liability as a carrier, but other courts emphatically affirm a different rule, holding that notice is not essential to terminate the liability of the company as a common carrier of goods.[80]

sas City &c. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. 111; Pennsylvania Co. v. Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162, note in 97 Am. St. 102.

[80] The New Hampshire rule followed by a number of courts, requires notice. See Moses v. Boston &c. R. Co., 32 N. H. 523, 64 Am. Dec. 381; Alabama &c. R. Co. v. Kidd, 35 Ala. 209; Mobile &c. R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586 and note; Louisville &c. R. Co. v. Oden, 80 Ala. 38; Columbus &c. R. Co. v. Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404; Wilson v. California &c. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Graves v. Hartford &c. R. Co., 38 Conn. 143, 9 Am. Rep. 369; Knight v. Georgia &c. R. Co., 18 Ga. App. 539, 90 S. E. 81; Leavenworth &c. R. Co. v. Maris, 16 Kans. 333; Jeffersonville &c. R. Co. v. Cleveland, 2 Bush (Ky.) 468; Maignan v. New Orleans &c. R. Co., 24 La. Ann. 333; United Fruit Co. v. New York &c. Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240; Walters v. Detroit United Ry., 139 Mich. 303, 102 N. W. 745; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Buckley v. Great Western &c. R. Co., 18 Mich. 121; Derosia v. Winona &c. R. Co., 18 Minn. 133; Pinney v. First Div. St. Paul &c. R. Co., 19 Minn. 251; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Poythress v. Durham &c. R. Co., 148 N. Car. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; McGregor v. Oregon &c. Nav. Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365; North Yakima Brew. &c. Co. v. Northern Pac. R. Co., 49 Wash. 375, 95 Pac. 486, 16 L. R. A. (N. S.) 935; Backhaus v. Chicago &c. R. Co., 92 Wis. 393, 66 N. W. 400; Mitchell v. Lancashire &c. R. Co. 10 L. R. Q. B. 256. The Massachusetts rule does not require notice and is followed in many other states. See Norway &c. Co. v. Boston &c. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423; Jackson v. Sacramento &c. R. Co., 23 Cal. 268; Southwestern R. Co. v. Felder 46 Ga. 433; Richards v. Michigan &c. R. Co., 20 Ill. 404; Porter v. Chicago &c. R. Co., 20 Ill. 407, 71 Am. Dec. 286; Chicago &c. R. Co. v. Scott, 42 Ill. 132; Merchants' &c.

It is to be observed, as a matter of importance, that the rule is different between cases where goods are stored while in course of transportation and cases where they are stored before a complete delivery to the carrier, or after they have been carried to their destination, for while in transit the liability of the company is that of a carrier and not that of a warehouseman,[81] except, perhaps, where the storage is by the direction of the consignor.[82]

§ 2213 (1465). The duty to carry.—By virtue of the character

R. Co. v. Hallock, 64 Ill. 284; Rothschild v. Michigan &c. R. Co., 69 Ill. 164; Cincinnati &c. R. Co. v. McCool, 26 Ind. 140; Bansemer v. Toledo &c. R. Co., 25 Ind. 434, 87 Am. Dec. 367; Chicago &c. R. Co. v. Reyman, 166 Ind. 278, 76 N. E. 970; Francis v. Dubuque &c. R. Co., 25 Iowa 60, 95 Am. Dec. 769; Mohr v. Chicago &c. R. Co., 40 Iowa 579; Hicks v. Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235; Barron v. Eldredge, 100 Mass. 455; Stowe v. New York &c. R. Co., 113 Mass. 521; Rice v. Hart, 118 Mass. 201, 19 Am. Rep. 433; Wilson &c. Co. v. Louisville &c. R. Co., 71 Mo. 203; Kansas City &c. Co. v. Neiswanger, 18 Mo. App. 103; Chalk v. Charlotte &c. R. Co., 85 N. Car. 423; McCarty v. New York &c. R. Co., 30 Pa. St. 247; Shenk v. Philadelphia &c. P. Co., 60 Pa. St. 109, 100 Am. Dec. 541; National &c. Co. v. Smart, 107 Pa. St. 492; Spears v. Spartanburg &c. R. Co., 11 S. Car. 158; Layton & Sons v. Charleston &c. R. Co., 90 S. Car. 323, 72 S. E. 988; Butler v. East Tenn. &c. R. Co., 8 Lea (Tenn.) 32 (but see Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443). The conflicting cases are collected and reviewed in the note in 97 Am. St. 90-94, and post, § 2297.

[81] Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Michigan &c. R. Co. v. Hale, 6 Mich. 243; Mills v. Michigan &c. R. Co., 45 N. Y. 622, 6 Am. Rep. 152. See also Texas &c. R. Co. v. Clayton, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. ed. 725; Western Transit Co. v. A. C. Leslie & Co., 242 U. S. 448, 37 Sup. Ct. 133, 61 L. ed. 423. It may have possession and still be only a warehouseman where the shipper has not yet made ready for shipment. Louisville &c. R. Co. v. Edwards' Admr., 183 Ky. 555, 209 S. W. 519.

[82] Hartman v. Louisville &c. R. Co., 39 Mo. App. 88. See also Mac Veagh v. Atchison &c. R. Co., 3 N. Mex. 205, 5 Pac. 457 (goods stopped by shipper in transit). See generally as to duties and liability as warehousemen. Yazoo &c. R. Co. v. Altman, 129 Ark. 358, 196 S. W. 122; Chalmers v. New York Cent. R. Co., 175 App. Div. 239, 161 N. Y. S. 577; Belknap v. Baltimore &c. R. Co., 79 W. Va. 691, 91 S. E. 656, 47 L R. A. (N. S.) 995 and note; United Metal &c. Co. v. Pryer, 243 Fed. 91.

of railroad companies as common carriers of goods they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport.[83] But, as we have already said, and as will be hereafter shown, the duty to carry is not always an absolute one, for there may be conditions and circumstances which will excuse the carrier from receiving goods for transportation. Nor does the general rule we have stated prohibit a railroad carrier from limiting to some extent its common-law liability, but that subject is elsewhere discussed and here we barely allude to it. A railroad carrier undertakes to transport goods offered to it when they are to be carried over its usual route and by the usual mode of transportation. While it is the duty of a railroad carrier to provide facilities for transporting goods usually carried by such common carriers,[84] it is not bound ordinarily to provide facilities for carrying

[83] New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. ed. 397; Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Kirby v. Western Union Tel. Co., 4 S. Dak. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. 765 and note; Missouri Pacific R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776; Harris v. Packwood 3 Taunt. 264; Peek v. North &c. R. Co., 10 H. L. Cas. 473, 511; Pickford v. Grand Junction &c. R. Co., 8 Mees & W. 372. See generally Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Little Rock &c. R. Co. v. Glidewell, 39 Ark. 487; Contra Costa &c. R. Co. v. Moss, 23 Cal. 323; New England &c. Co. v. Maine &c. R. Co., 57 Maine 188, 2 Am. Rep. 31; Thomas v. Boston &c. R. Co., 10 Metc. (Mass.) 472; Norway &c. Co. v. Boston &c. R. Co., 67 Mass. 263, 61 Am. Dec. 423; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Rogers &c. Works v. Erie &c. Co., 20 N. J. Eq. 379; Avinger v. South Carolina R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716; East Tenn. &c. R. Co. v Nelson, 1 Cold. (Tenn.) 272; Gulf &c. R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. Rep. 494. See also Southern Exp. Co. v. R. M Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619; St. Louis &c. R. Co. v. State, 76 Okla. 60, 184 Pac. 442, 7 A. L. R. 140, 142 (citing text).

[84] Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320; Beard v. Illinois &c. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Hoffman &c. Co. v. Railway Co., 119 Mo. App. 495, 94 S. W. 597; Cronan v. St. Louis &c.

articles of an extraordinary character requiring for their carriage means of a different kind or character from those it has adopted.[85]

§ 2214 (1466). Refusal to carry—Excuses for.—The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject among other limitations and qualifications to the limitation that its obligation extends only to the kind of goods the company undertakes to carry.[86] In other words, railroad companies are

R. Co., 149 Mo. App. 384, 130 S. W. 437; Branch v. Wilmington &c. R. Co., 77 N. Car. 347; Texas &c. R. Co. v. Barrow (Tex. Civ. App.), 94 S. W. 176. Statutes also frequently contain similar provisions. See Stock Yards Co. v. Louisville &c. R. Co., 67 Fed. 35; Cobb v. Illinois Cent. R. Co., 38 Iowa 601; State v. Missouri Pac. R. Co., 29 Nebr. 550, 45 N. W. 785; Houston &c. R. Co. v. Smith, 63 Tex. 322; Davis v. Texas &c. R. Co., 91 Tex. 505, 44 S. W. 822; Galveston &c. R. Co. v. Schmidt (Tex. Civ. App.), 25 S. W. 452; Southeastern R. Co. v. Railway Comrs., 5 Q. B. Div. 217; Barrett v. Great Northern R. Co., 87 E. C. L. 423; Bennett v. Manchester &c. R. Co., 95 E. C. L. 707. And see generally to same effect, St. Louis &c. R. Co. v. Wynne Hook &c. Co., 81 Ark. 373, 99 S. W. 375; Illinois Cent. R. Co. v. River &c. Coke Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A. (N. S.) 643, Ann. Cas. 1914C, 1255n; Baker v. St. Louis &c. R. Co., 145 Mo. App. 189, 129 S. W. 436; Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 S. W. 530.

[85] Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Coup v. Wabash &c. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Pitlock v. Wells &c. Co., 109 Mass. 452. See generally Chicago &c. R. Co. v. Lawton Refining Co., 253 Fed. 705; Gordon v. Hutchinson, 1 W. & S. 285; Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Galena &c. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Illinois Central R. Co. v. Cobb, 64 Ill. 128; Evansville &c. R. Co. v. Duncan, 28 Ind. 441, 92 Am. Dec. 322; Miller Engineering Co. v. Louisiana Ry. &c. Co., 144 La. 786, 81 So. 314; Di Giorgio Importing &c. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108; Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; Ballentine v. North &c. Co., 40 Mo. 491, 93 Am. Dec. 315; Bouker v. Long Island R. Co., 89 Hun 202, 35 N. Y. S. 23, 25; Peet v. Chicago &c. R. Co., 20 Wis. 594, 91 Am. Dec. 446; Oxlade, North &c. R. Co., In re, 15 C. B. (N. S.) 680; Hales v. London &c. R. Co., 4 Best & S. 66.

[86] Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Kemp v.

common carriers only as to those goods which are of the kind usually or professedly carried.[87] Thus, a railroad company which does not undertake to carry dogs cannot be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggagemaster.[88] A farther qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public.[89] And the implied obligation of a railroad company

Coughtry, 11 Johns. (N. Y.) 107; King v. Lennox, 19 Johns. (N. Y.) 235; Beckman v. Shoues, 5 Rawle (Pa.) 179, 28 Am. Dec. 653; post, § 2223. See also Southern Pac. Co. v. State, 19 Ariz. 20, 165 Pac. 303.

[87] Citizens' Bank v. Nantucket S. B. Co., 2 Story (U. S.) 16; Richards v. Gilbert, 5 Day (Conn.) 415; Williams v. Grant, 1 Conn. 487, 6 Am. Dec. 235; Crosby v. Fitch, 12 Conn. 410; Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Illinois Cent. &c. Co. v. Cobb, 64 Ill. 128; Michigan &c. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Lake Shore v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Moriarity v. Harnden's Express, 1 Daly (N. Y. C. P.) 227; DeMott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; Bell v. Reed, 4 Binn. (Pa.) 127; Thomas v. North Staffordshire R. Co., 21 Sol. J. 183; Blower v. Great Western R. Co., L. R. 7 C. P. 655; Johnson v. Midland R. Co., 4 Exchq. 367, 18 L. J. Exch. 366; McManus v. Lancashire &c. R. Co., 4 H. & N. 327, 28 L. J. Exch. 343; Benett v. Peninsular &c. S. B. Co., 6 C. B. 775. As to other goods carried by special agreement or as a matter of accommodation, railroad companies are private carriers or bailees for hire. Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Kimball v. Rutland &c. R. Co., 26 Vt. 247, 62 Am. Dec. 567. See Pfister v. Central R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404, construing provision of California code that the duty of a carrier is confined to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

[88] Honeyman v. Oregan &c. R. Co., 13 Ore. 352, 57 Am. Rep. 20. But the company will be liable if dogs are permitted to be carried as "baggageman's perquisites." Cantling v. Hannibal &c. R. Co., 54 Mo. 385, 14 Am. Rep. 476. There is no common carrier's liability by railroad companies for letters lost in the carriage of the mail. Central Railroad v. Lampley, 76 Ala. 357, 52 Am. Rep. 334.

[89] Harp v. Choctaw &c. R. Co., 118 Fed. 169, 173 (quoting text); Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Coup v. Wabash R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374. In Elkins v. Boston &c. R. Co., 23 N. H. (3 Fost.) 275, it is held that

as a common carrier, arising from its relation to the public, is limited by the termini of its own route. The fact that it has connections with other routes, extending beyond its own termini, which it does not operate, control, or own, does not, in the absence of a special contract, make it liable as a common carrier for a failure to carry, or furnish means to carry, merchandise over such other routes.[90] Again, goods may properly be refused which are tendered in an unfit condition for transportation,[91] or

a railroad company which occasionally carries goods in passenger trains is not a common carrier of goods in such trains. And similarly railroads which occasionally carry passengers in freight trains do not thereby become as to those trains carriers of passengers. Murch v. Concord R. Co., 29 N. H. (9 Fost.) 9. They are not bound to carry except on usual trains. Palmer and London &c. R. Co., In re, L. R. 1 C. P. 588; Lane v. Cotton, 1 Ld. Rayd. 646; Donahoe v. London &c. R. Co., 15 W. R. 772. But there are cases in which it must furnish proper facilities and cars for the particular purpose or goods, even though a particular kind of car may be necessary or the company may not own it. Atlanta &c. R. Co. v. Geraty, 166 Fed. 10, 20 L. R. A. (N. S.) 310; Mathis v. Southern R. Co., 65 S. Car. 271, 43 S. E. 684, 61 L. R. A. 824. See also Baker v. Boston &c. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. 937, 12 Ann. Cas. 1072; and post notes 30, 31, 32. A carrier accustomed to receive and transport lumber requiring cars forty feet long is held bound to furnish cars for such lumber, in Wadley So. R. Co. v. Kent & Downs, 145 Ga. 689, 89 S. E. 765.

[90] Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682. See also Crouch v. London &c. R. Co., 25 Eng. L. & Eq. 287; Wheeler v. San Francisco &c. R. Co., 31 Cal. 46, 89 Am. Dec. 147; Pitlock v. Wells, Fargo & Co., 109 Mass. 452. In Hunter v. Southern P. R. Co., 76 Tex. 195, 13 S. W. 190, it was held that the mere fact that a railroad company receives goods marked for a place beyond its own line does not import an agreement to transport the goods to the destination named as a common carrier.

[91] Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214n, Ann. Cas. 1912B, 389, 391 (citing text); Union Ex. Co. v. Graham, 26 Ohio St. 595; Munster v. Southeastern R. Co., 4 C. B. N. S. 676, 27 L. J. C. P. 308; Hart v. Baxendale, 16 L. T. N. S. 390. And to same effect are Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Elgin &c. R. Co. v. Bates &c. Co., 98 Ill. App. 311; Fitzgerald v. Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341. In Atlantic &c. R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389, it is said that the carrier should refuse the shipment

which are dangerous,[92] or which are reasonably believed to be dangerous.[93] And goods may be refused which are tendered during a press of business so unusual as to have exhausted an equipment which would have been sufficient for all reasonably expected demands,[94] or during a period of danger, as, for instance,

and enable the shipper to put it in a fit condition.

[92] The Nith, 36 Fed. 86; Boston &c. R. Co. v Shidly, 107 Mass. 568. Or which the law prohibits it from carrying. State v. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706; Milwaukee Malt &c. Co. v. Chicago &c. R. Co., 73 Iowa 98, 34 N. W. 761 (intoxicating liquor); Lake Erie &c. R. Co. v. James, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192 (corpse, where permit is not such as the law requires); Gum v. St. Louis &c. Ry. Co. (Mo. App.), 198 S. W. 494. But not because prohibited by city ordinance which is invalid. Southern Express Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619. But compare where city ordinance is valid, Chicago v. Chicago &c. R. Co., 275 Ill. 30, 113 N. E. 849, L. R. A. 1917C. 238n. See also American Express Co. v. Miller, 104 Miss. 247, 61 So. 306, 45 L. R. A. (N. S.) 120n.

[93] Nitro-Glycerine Case, The, 15 Wall. (U. S.) 524, 21 L. ed. 206. See also Norfolk &c. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532; California Powder Works v. Railroad, 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648. But unless there is reasonable ground for suspicion the carrier can not compel consignor to disclose the character of the goods. Nitro-Glycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206; Boston &c. R. Co. v. Shanly, 107 Mass. 568, 12 Am. L. T. R. N. S. 500.

[94] Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; White v. Toncray, 9 Leigh (Va.) 347; Peet v. Chicago &c. R. Co., 20 Wis. 594, 91 Am. Dec. 446; Lovett v. Hobbs, 2 Show. 127; Riley v. Horne, 5 Bing. 217; Robins, Ex parte, 7 Dow. 566. See also Richardson v. Chicago &c. R. Co., 61 Wis. 596, 21 N. W. 49. Particularly the carrier should decline to receive perishable goods. Tierney v. New York Cent. R. Co., 76 N. Y. 305. But a railroad company may not take advantage of such condition as that stated in the text, so as to extend facilities to one customer to the injury of another. Houston &c. R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421. And see Cross v. McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846. See Toledo &c. R. Co. v. Lockhart, 71 Ill. 627; Wibert v. New York &c. R. Co., 12 N. Y. 245; Condict v. Grand Trunk R. Co., 54 N. Y 500; Great Western &c. R. Co. v. Burns, 60 Ill. 284. Press of business as excusing the refusal to transport has been elsewhere touched upon. Post, § 2219, et seq. See also Missouri &c. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182; Southern R. Co. v. Atlanta &c. Supply Co., 135 Ga. 35, 68 S. E. 807; Montana &c. R. Co. v. Morley, 198 Fed. 991.

from a mob.[95] They may be refused, too, for non-prepayment of freight.[96] The obligation of a railroad company to carry does not require it to accept goods from a person having no authority

[95] Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. ed. 447; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois Cent. R. Co. v. Ashmead, 58 Ill. 487; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Illinois Cent. R. Co. v. Hornberger, 77 Ill. 457; Phelps v. Illinois Co., 94 Ill. 548; Edwards v. Sherratt, 1 East 604. See as to strike as excuse, notes in 22 L. R. A. (N. S.) 1200 and 35 L. R. A. 623. And as to right of express company to refuse money offered for carriage the day before it could be transported, see Platt v. Lecocoq, 158 Fed. 723, 15 L. R. A. (N. S.) 558. See as to when the needs of the government during the war will excuse the company from furnishing shipping facilities to individual commerce. Norfolk &c. R. Co. v. Public Service Com., 82 W. Va. 408, 96 S. E. 62, 8 A. L. R. 155 and note.

[96] Galena &c. R. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Shipper v. Penn. R., 47 Pa. St. 338; Wyld v. Pickford, 8 M. & W. 443; Batson v. Donovan, 4 B. & Ald. 21. It has been held that in an action for damages resulting from refusal to carry, an averment of a readiness to pay is as good as an averment of a tender. Pickford v. Grand Junction Railway, 8 M. & W. 372; Bastard v. Bastard, 2 Show. 81. The company can not sue for price of carriage until delivery of goods. Barnes v. Marshall, 18 Q. B. 785, 21 L. J. Q. B. 388. Premature shipment after notice that goods will be held for prepayment of charges. Campion v. Canadian Pac. R. Co., 43 Fed. 775. In Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137, it was held that in an action for damages for refusal to receive from a connecting line without prepayment freight billed to a certain flag station, the railroad company may show that it had a fixed regulation requiring prepayment on all freight consigned to that station, and that both plaintiff and the connecting line were advised thereof. Under Code N. Car. § 1963, a company may lawfully refuse to receive freight offered by a connecting railway company without prepayment, though it does not demand prepayment of others, if the connecting railroad has notice that prepayment is required. Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137. But if a company accepts freight without prepayment, it is bound to use the same care as if the freight charges had been prepaid. St. Louis &c. R. Co. v. Flannagan, 23 Ill. App. 489. And it must not make an excessive demand. Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49. In Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081, a manufacturer had agreed to furnish and set up a monument for $1,500. A few days before the date set for the dedication the monument was delivered to a railroad company,

to deliver them,[97] but if goods are in good faith accepted from one having no right to deliver them, and it carries them to their destination, and there in good faith yields them to the shipper, it cannot be held liable for a conversion.[98] If goods which it may properly reject are actually, not merely constructively, accepted for carriage, the common carrier's liability attaches.[99]

§ 2215. Duty to carry intoxicating liquor—Webb-Kenyon Act.—As already stated, we think a railroad company may refuse to receive and carry an article which it is prohibited by a valid statute from transporting and which it would be unlawful for

but was intercepted at New York City, and sent to its destination with a special engine, the charge of the defendant for this service, $700, being deducted from the amount agreed to be paid for the monument. At New York the manufacturer's agent pointed out to the defendant that the monument was billed to the manufacturer, and that there was no occasion for the special service, as in the ordinary course of business it would be delivered in time, and the defendant was requested to furnish its regular service, which it declined to do. The court held that the railroad knew that the special service was unnecessary, and would result in converting to it a large portion of the amount agreed upon to be paid for the monument, and, the association ordering the monument being unincorporated and irresponsible, the court held that the plaintiff could recover the $700 from the railroad company, because of the breach of duty of the carrier in withholding regular service and because of the wrongful interference with the rights of the manufacturer.

[97] Fitch v. Newberry, 1 Doug. (Mich.) 1.

[98] Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 12 Am. St. 555; Strickland v. Barrett, 20 Pick. (Mass.) 415; Leonard v. Tidd, 3 Mete. (Mass.) 6; Loring v. Mulcahy, 3 Allen (Mass.) 575; Metcalf v. McLaughlin, 122 Mass. 84. But while a carrier acting in good faith may be protected in delivering to the shipper although he was not the owner, it is, nevertheless, true that the carrier will be protected where the goods are actually delivered to the owner. Shellenberg v. Fremont &c. R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. 561.

[99] Hannibal &c. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423; David and Caroline, The, 5 Blatch. (U. S.) 266; Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389, 391 (citing text); Porcher v. Northeastern Railroad, 14 Rich. (S. Car.) 181; Pickford v. Grand Junction Railway, 12 M. & W. 766; Great Northern &c. R. Co. v. Shepherd, 8 Exch. 30, 14 Eng. L. & Eq. 367.

the company to carry, and this rule has been held to apply to the carriage of intoxicating liquors into prohibition or dry territory; but where the shipment is from one state into another, constituting interstate commerce, it was settled notwithstanding some conflict of opinion, that a state statute forbidding the bringing of intoxicating liquors into such territory, prior to the Webb-Kenyon Act of Congress, did not justify the carrier in refusing to accept and carry such liquor.[1] In 1913, however, Congress passed what is known as the Webb-Kenyon Act "devesting intoxicating liquors of their interstate character in certain cases," and prohibiting the shipment or transportation from one state, territory or district, etc., to another of intoxicating liquors intended "to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of such state, territory, or district," etc.[2] Whether, or in what cases and to what extent, this validates or revives state statutes upon the subject is a question that has not been fully settled.[3] As to the subject here under consideration, however, it may safely be said that if the carrier will be subject to prosecu-

[1] Louisville &c. R. Co. v. F. W. Cook Brewing Co., 172 Fed. 117, 40 L. R. A. (N. S.) 798, and note, affirmed in 223 U. S. 70, 32 Sup. Ct. 189, 56 L. ed. 355; American Express Co. v. Miller, 104 Miss. 247, 61 So. 306, 45 L. R. A. (N. S.) 120n. But compare Crescent Brewing Co. v. Oregon &c. R. Co., 24 Idaho 106, 132 Pac. 975.

[2] Act of March 1, 1913, Ch. 90, 37 U. S. Stat. at L. 699.

[3] See and compare Adams Express Co. v. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; Atkinson v. Southern Express Co., 94 S. Car. 444, 788 S. E. 516, 520; Theo. Hamm Brewing Co. v. Chicago &c. R. Co., 243 Fed. 143. As to the application and effect of the Webb-Kenyon Act, see generally Clark Distilling Co. v. Western Md. R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326, L. R. A. 1917B, 1218 Ann. Cas. 1917B, 845; Seaboard Air Line R. Co. v. North Carolina, 245 U. S. 298, 38 Sup. Ct. 96, 61 L. ed. 299 apparently taking a somewhat different view from that taken in Adams Express Co. v. Kentucky, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. ed. 1267, Ann. Cas. 1915D. 1167; American Express Co. v. Beer, 107 Miss. 528, 65 So. 575, L. R. A. 1918B, 446n, Ann. Cas. 1916D, 127, and note reviewing other recent cases. The act authorizing federal control during the war and proclamations and orders thereunder and on the subject of intoxicating liquor have also modified the law in some respects during its continuance.

tion and penalty under a valid statute it may refuse to receive and carry the liquor, and the prohibition amendment to the Constitution of the United States will doubtless render the general question as to the transportation of intoxicating liquors largely a mere academic one in the future.

§ 2216 (1467). Discrimination—Unjust forbidden.—The common law prohibits common carriers from making unjust discriminations, in furnishing facilities for transporting goods and in charges for transportation. The authorities agree that unjust discrimination is forbidden,[4] but as to what is to be regarded as unjust discrimination there is some diversity of

[4] Union Pac. R. Co. v. United States, 117 U. S. 355, 7 Sup. Ct. 772, 29 L. ed. 920; Texas &c. Co. v. Texas &c. R. Co., 6 Fed. 426; Southern Express Co. v. Memphis &c. R. Co., 8 Fed. 799; Hays v. Pennsylvania Co., 12 Fed. 309; McCoy v. Cincinnati &c. R. Co., 13 Fed. 3; Samuels v. Louisville &c. R. Co., 31 Fed. 57; Kinsley v. Buffalo &c. R. Co., 37 Fed. 181; Cowan v. Bond, 39 Fed. 54; Murray v. Chicago &c. R. Co., 92 Fed. 868; Tift v. Southern R. Co., 123 Fed. 789; Bayles v. Kansas &c. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; Chicago &c. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Missouri &c. Ry. Co. v. New Era Milling Co., 79 Kans. 435, 100 Pac. 273 (quoting text); New England &c. R. Co. v. Maine &c. R. Co., 57 Maine 188, 2 Am. Rep. 31; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; State v. Missouri &c. Ry. Co., 262 Mo. 507, 172 S. W. 35, 40, L. R. A. 1915C, 778, Ann. Cas. 1916E, 949 (citing text); McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Root v. Long Island &c. R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643; Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Sharpless v. Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Benson, Ex parte, 18 S. Car. 38, 44 Am. Rep. 564; Avinger v. South Carolina &c. R. Co., 29 S. Car. 265, 13 Am. St. 716; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; Baxendale v. Eastern &c. R. Co., 4 Com. B. (N. S.) 62; Branley v. Southeastern &c. R. Co., 12 Com. B. (N. S.) 63; Evershed v. London &c. R. Co., L. R. 3 Q. B. D. 134; Garton v. Bristol &c. R. Co., 1 Best & S. 112; Mogul &c. R. Co. v. McGregor, L. R. 21 Q. B. D. 544; Nicholson v. Great Western &c. R. Co., 5 C. B. (N. S.) 748. See also under statutes State v. Atlantic Coast Line R. Co., 52 Fla. 646, 41 So. 705, 12 L. R. A. (N. S.) 506n, and cases cited.

opinion.[5] While it is true that the common law[6] forbids discrimination, what constitutes discrimination in such a sense, especially as to rates, has given rise to considerable discussion. Expressions in many of the opinions seem to indicate that even as to rates all shippers must be treated alike, and one rate charged in all cases, but this presses the rule beyond its legitimate scope. The cases go so far as to affirm that "He" (the carrier) "is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure."[7] The doctrine asserted in the opinion

[5] Dinsmore v. Louisville &c. R. Co., 2 Fed. 465; Burlington &c. R. Co. v. Northwestern &c. R. Co., 31 Fed. 652; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and notes; Cook v. Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512; New England Express Co. v. Maine &c. R. Co., 57 Maine 188; Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; State v. Cincinnati &c. R. Co., 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 812; Sandford v. Railroad Co., 24 Pa. St. 378, 64 Am. Dec. 667; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

[6] We are not here concerned with the question of discrimination as defined by statutes either state or national but are treating of the common-law doctrine. We have elsewhere discussed the question of the effect of statutes regulating the subject of discrimination by carriers.

[7] Per Wallace, J. in Menacho v. Ward, 27 Fed. 529, quoted with approval in Lough v. Outerbridge, 143 N. Y. 271, 42 Am. St. 712. See also Evershed v. London &c. R. Co., L. R. 3 Q. B. D. 134; Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593, and cases cited. See also cases cited in the next note. The question is ably discussed in Interstate Commerce Com. v. Baltimore &c. R. Co., 43 Fed. 37. It is true that the court in the case referred to was dealing with the Interstate Commerce Act, but the reasoning upon the question as to what constitutes an unjust discrimination applies to cases arising under the common-law rule. It is held in the case under immediate mention that the burden of proving unjust discrimination is on the shipper, citing on that point, Denaby &c. Co. v. Manchester &c. R. Co., L. R. 11 App. Cas. 97.

from which we have quoted states the rule recognized by the great weight of authority.[8] But a different view has been taken

[8] In a text book of great merit the subject is well-discussed and it was said: "The cases contain many statements which seem to be in conflict, yet, except where the question is not influenced by local statutes it is believed that all the cases are in substantial harmony in reference to the vital principles involved. At the foundation of the whole matter lies the common-law rule that in each particular case there shall be a reasonable compensation and no more." Hutchinson Carriers (3d ed.), § 521. See Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593; Union Pacific R. Co. v. United States, 117 U. S. 355, 6 Sup. Ct. 772, 29 L. ed. 920; Hays v. Pennsylvania Co., 12 Fed. 309; Little Rock &c. R. Co. v. Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353 (citing text); Kansas &c. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744; Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Chicago &c. R. Co. v. People, 67 Ill. 1; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Spofford v. Boston &c. R. Co., 128 Mass. 326; Christie v. Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567; Stewart v. Lehigh &c. R. Co., 38 N. J. L. 505 (explaining Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457); Root v. Railroad Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643; Scofield v. Lake Shore &c. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Hersh v. Northern &c. R. Co., 74 Pa. St. 181; State v. Central Vt. R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. 1065; Hozier v. Caledonian &c. R. Co., 1 Nev. & McN. R. Cas. 27; Nicholson v. Great Western &c. R. Co., 7 Com. B. (N. S.) 755; Great Western &c. R. Co. v. Sutton, 4 L. R. H. L. 226; Ransome v. Eastern &c. R. Co., 1 Com. B. (N. S.) 437; Jones v. Eastern &c. R. Co., 1 Nev. & McN. R. Cas. 45; Oxlade v. North Eastern R. Co., 1 Nev. & McN. R. Cas. 72; Baxendale v. Great Western R. Co., 5 C. B. (N. S.) 336; Bellsdyke v. North British &c. R. Co., 2 Nev. & McN. R. Cas. 105. But secret rebates to one shipper and excessive charges to another constitute unjust discrimination, and the latter may usually recover such excessive charges. Cook v. Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512; Cowden v. Pacific &c. Co., 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. 142; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. 589; Baltimore &c. R. Co. v. Diamond Coal Co., 61 Ohio St. 242, 55 N. E. 616; Murray v. Railway Co., 92 Fed. 868. See also McNeill v. Durham &c. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227; Texas &c. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 436, 27 Sup. Ct. 350, 353, 51 L. ed. 553. But compare State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

by a number of courts.[9] Evidence of customary and comparative rates has been held admissible in an action at common law to "recover back" excessive charges.[10]

§ 2217 (1468). Discrimination—Like facilities to be furnished to all where like conditions exist.—It is, we think, safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike.[11] It cannot furnish facilities

[9] Missouri &c. R. Co. v. New Era Milling Co., 79 Kans. 435, 100 Pac. 273 and cases there cited; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846. See also Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643 and note; Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291.

[10] Kindel v. Colorado &c. R. Co., 57 Colo. 1, 139 Pac. 1105, Ann. Cas. 1916A, 57. See also Halliday Milling Co. v. Louisiana &c. R. Co., 80 Ark. 536, 98 S. W. 374. But compare Anniston v. Southern R Co., 145 Ala. 351, 40 So. 965; Hopper v. Chicago Ry. Co., 91 Iowa 639, 60 N. W. 487. That shipper may recover the excess in case of excessive charges at common law, see also A. L. Jones Co. v. Chicago &c. Ry. Co., 213 Ill. App. 283; Chicago &c. Ry. Co. v. Gist, 79 Okla. 8, 190 Pac. 878.

[11] Union &c. R. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. ed. 396; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Ocean &c. Co. v. Savannah Locomotive &c. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. 265; Galena &c. R. Co. v. Rae, 18 Ill. 498, 68 Am. Dec. 574; Great Western &c. R. Co. v. Burns, 60 Ill. 284; Chicago &c. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; International &c. Co. v. Grand Trunk R. Co., 81 Maine 92, 16 Atl. 370; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Bennett v. Dutton, 10 N. H. 481; Kenney v. Grand Trunk &c. R. Co., 47 N. Y. 525; Sanford v. Railroad Co., 24 Pa. St. 378; 64 Am. Dec. 667; Hoover v. Pennsylvania Co., 156 Pa. St. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. 43; Avinger v. South Carolina R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716; Houston &c. R. Co. v. Smith, 63 Tex. 322; Crouch v. London &c. R. Co., 23 L. J. C. P. 73; Crouch v. Great Northern &c. R. Co., 11 Exch. 742; Middleton v. Fowler, 1 Salk. 282; Boson v. Sandford, 2 Salk. 440. See cases cited in Mr. Freeman's note to Root v. Long Island &c. R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643, 647. See also Taylor v. Florida &c. R. Co., 54 Fla. 635, 45 So. 574, 16 L. R. A. (N. S.) 307n,

to some shippers and deny them to other shippers unless there is a difference in conditions or circumstances such as makes the discrimination a just one. Public policy forbids that common carriers should be permitted to favor one shipper or one class of shippers in discharging the general duty to accept and carry goods, to the prejudice of others. The reasons upon which rest the cases holding that a difference may be made in the rates charged shippers do not fully apply to the duty to carry goods duly offered for transportation.[12]

§ 2218 (1469). Discrimination—Effect on stipulations limiting liability.—In cases where a railroad carrier discriminates against a shipper by giving others preference in the time, mode or rapidity of transportation, there is reason for affirming that if loss results from such discrimination the carrier will lose the benefit of contract stipulations limiting its liability, and will be held to accountability as an insurer. The wrong on its part in such cases is such as to justify the courts in holding that it can derive no benefit from the contract, since such a wrong is practically a repudiation of the contract. At all events, there is such a default on its part as requires the conclusion that it can not hold the other party bound by the contract. If the contract is

127 Am. St. 155, 14 Ann. Cas. 472; Bedford &c. Co. v. Oman, 115 Ky. 369, 73 S. W. 1038; Crescent Coal Co. v. Louisville &c. R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442n; State v. Texas &c. R. Co., 52 La. Ann. 1850, 28 So. 284; State v. Chicago &c. R. Co., 72 Nebr. 542, 101 N. W. 23; Toledo &c. R. Co. v. Wren, 78 Ohio St. 137, 84 N. E. 785, 16 L. R. A. (N. S.) 914; Houston &c. R. Co. v. Smith, 63 Tex. 322; Nichols v. Railroad Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778. But a difference in circumstances, condition and situation may justify the adoption of a different rule or treatment. Choctaw &c. R. Co. v. State, 73 Ark. 373, 84 S. W. 502; Harp v. Choctaw &c. R. Co., 118 Fed. 169; Hocking Val. R. Co. v. New York Coal Co., 217 Fed. 727.

[12] The effect of the Interstate Commerce Act is elsewhere considered, but see generally on that subject, Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. ed. 352; Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. ed. 896; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494; Puritan Coal Min. Co. v. Pennsylvania R. Co., 237 Pa. St. 420, 85 Atl. 426, Ann. Cas. 1914B, 37 and note.

in part abandoned, disavowed or rendered ineffective by the wrongful acts of the carrier it cannot justly take advantage of any of its stipulations. Our conclusion is, as we believe, supported by principle, and it has support from authority.[13] An undue preference of the character mentioned is an actionable wrong and will constitute the basis of a cause of action for damages, and this being true, the carrier violates both the law and its contract, for the law as a factor enters into the contract and the duty to act with impartiality, and, under like conditions and circumstances, treat all shippers alike, is prescribed by law, so that the wrong-doing carrier is not in a situation to invoke judicial assistance to enable it to escape liability under the contract stipulations limiting its liability. But where there is nothing more than an undue preference in the matter of the rates of freight the principles we have stated cannot apply, for, while such a wrong may give a right of action for damages, it cannot be justly said to contribute to the loss, or, indeed, to have causal connection, proximate or remote, with the injury.

§ 2219 (1470). **Duty to furnish cars.**—It is the duty of a railroad company to provide facilities for the transportation of goods, but this duty is not an absolute one. The company must furnish cars sufficient to transport goods, offered in the usual and ordinary course of business, but it is not bound to anticipate and prepare for an unexpected press of business. It is under an obligation to keep for use such rolling stock as the requirements of ordinary business make necessary, but is not under a duty to keep extra rolling stock to meet extraordinary or unprecedented requirements.[14] A plaintiff who seeks to recover against a rail-

[13] Keeney v. Grand Trunk &c. R. Co., 47 N. Y. 525. See also Texas &c. R. Co. v. Davis, 2 Tex. Civ. App. Cas. § 191.

[14] Louisville &c. R. Co. v. Queen City &c. Co., 99 Ky. 217, 35 S. W. 626, citing Houston &c. R. Co. v. Smith, 63 Tex. 322; Thayer v. Burchard, 99 Mass. 508. See also Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967; Logan Coal Co. v. Pennsylvania R. Co., 154 Fed. 497; Montana &c. R. Co. v. Morley, 198 Fed. 901; St. Louis &c. R. Co. v. Wynne & Co., 81 Ark. 373, 99 S. W. 374, 382 (citing text); Midland Val. R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380; Porcher v. Northeastern R. Co., 14 Rich. L. (S. Car.) 181; Mauldin v. Seaboard

road company for a failure to furnish cars must aver and prove that the goods were properly offered for transportation.[15] And reasonable demand or notice of the request must be given.[16]

§ 2220 (1471). **Refusal to carry—Duty to state grounds of refusal.**—It is held to be the duty of a railroad company, when goods of the kind it carries are properly offered to it for transportation, to state the grounds upon which it refuses to receive them.[17] If, because of an unexpected and extraordinary press of business, or the like, the carrier is unable to furnish cars or carry the goods without unreasonable or unusual delay, it should duly inform the shipper.[18] It has also been held that where the

Air Line R. Co., 73 S. Car. 9, 52 S. E. 677, 678 (citing text). In Yazoo &c. R. Co. v. Blum Co., 89 Miss. 242, 40 So. 748, 11 Ann. Cas. 272, it is held that: "A carrier is legally bound to provide sufficient facilities for the reasonably prompt transportation of goods tendered for carriage, and is liable for a failure to transport promptly, whether the failure is due to a want of facilities or to a captious refusal to carry it;" and that where, in an action against it for failure to transport cotton with reasonable dispatch, it admitted that it had not provided equipment sufficient for the prompt handling during each recurring market season of the average cotton crop produced under normal conditions, a plea averring that during the market season when the cotton in question was offered for shipment, there was an extra large crop and that the marketing of it created a demand for cars and facilities which could not have been foreseen, was immaterial. See also Joynes v. Pennsylvania R. Co., 235 Pa. St. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964.

[15] Little Rock &c. R. Co. v. Conatser, 61 Ark. 562, 33 S. W. 1057; Pennington v. Douglas &c. Ry. Co., 3 Ga. App. 665, 60 S. E. 485, 488 (citing text). And it is held that a proper demand must be made, Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; Louisville &c. Co. v. Godman, 104 Ind. 490, 494, 4 N. E. 163. See also Railroad Co. v. Bundy, 97 Ill. App. 202; post, § 2225.

[16] McNeer v. Chesapeake &c. Ry. Co., 76 W. Va. 803, 86 S. E. 887 (three days notice for shipment of live stock insufficient in a period of great activity in shipments).

[17] Railway Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693, approved in Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. ed. 578.

[18] Pittsburgh &c. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; Daoust v. Chicago &c. R. Co., 149 Iowa 650, 128 N. W. 1106, 34 L. R. A. (N. S.) 637n; Russell Grain Co. v. Railroad Co., 114 Mo. App. 488, 89 S. W. 908; Unionville Produce Co. v. Chicago &c. R. Co., 168 Mo. App. 168, 153 S. W. 63; State v. Chicago &c. R. Co., 71 Nebr. 593,

right to refuse depends upon specific grounds, and the grounds upon which the refusal is based are stated, the carrier cannot successfully defend on other grounds.[19] So, where specific grounds are not stated, but there is a general refusal, it seems that the carrier cannot justify his refusal unless there was a general right to refuse.[20]

§ 2221 (1472). **Duty of carriers as to cars and equipments—Standard of.**—The standard of duty by which, the acts of a railroad carrier are to be measured is not easily defined, but the question as to what constitutes the standard is in many cases the controlling one. Where there is a contract limiting the liability of the carrier, the question, as we have indicated, is whether there was or was not negligence, and whether there was or was not negligence depends to a great degree upon the nature and extent of the carrier's duty. Some of the cases lay down a very stringent rule. Thus, in one of them it was said, in speaking of the vehicle used by the carrier, that: "It must be perfect in all its parts, in default of which he (the carrier) becomes responsible for any loss that occurs in consequence of the defect or to which it contributes,"[21] but this is a stronger statement than principle or authority justifies, except, of course, where the carrier is an insurer. It is no doubt true that the standard of duty is a high one, but we do not believe that, where the question is as to whether there was negligence, it is so high as to require that the means and facilities employed by the carrier should be perfect in all their parts. It has been held that the rule of law is

99 N. W. 309; Missouri &c. R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Nichols v. Railroad Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. 778; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226. And it must do so if the connecting carrier is unable to furnish transportation. Louisville &c. R. Co. v. Farmers' &c., 107 Ky. 53, 52 S. W. 972. See also St. Louis &c. R. Co. v. Edwards, 78 Fed. 745.

[19] Hannibal &c. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. ed. 423.

[20] We think the statement in the text is supported by the principle that a party who is duly requested to perform a duty must assign reasons for his refusal or he can not rely upon specific grounds as excusing his refusal. Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410 and note; Vinton v. Baldwin, 95 Ind. 433.

[21] Empire &c. Co. v. Wamsutta Co., 63 Pa. St. 14, 3 Am. Rep. 515.

that the carrier is guilty of negligence if it has not adopted "the most approved modes of construction and machinery in known use in the business and the best precautions in known practical use for securing safety," but it is "not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction."[22] The case to which we have referred states the rule quite as strongly as principle warrants. It may, indeed, be doubted whether it does not state the rule too strongly. We should be inclined to doubt whether a railroad carrier of goods is in all cases bound to adopt the most approved machinery and appliances, since such a rule would require it to discard machinery and appliances because better had been invented or discovered, although those which it had in use were safe and adapted to the purposes for which it was intended to be used. We do not say that it may not be the duty of the carrier to exercise the highest degree of practicable care, but we doubt whether that degree of care invariably requires it to discard appliances in use and procure newer ones in order that it may have "the most approved."

§ 2222 (1473). Express contract to furnish cars.—Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract.[23] Where there is no express contract, then, as we have seen, an unusual press of business may excuse the company for a failure to furnish cars, but where there is an express contract the rule is that a press of business, although unusual and unex-

[22] Steinweg v. Erie &c. R. Co., 43 N. Y. 123, 3 Am. Rep. 673, citing Ford v. London &c. R. Co., 2 Fost. & Fin. 730; Hegeman v. Western &c. R. Co., 13 N. Y. 9, 64 Am. Dec. 617 and note; Field v. New York &c. R. Co., 32 N. Y. 339. See generally Illinois Cent. R. Co. v. Hall, 58 Ill. 409; Sloan v. St. Louis &c. R. Co., 58 Mo. 220.

[23] Clark v. Ulster &c. R. Co., 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164n, 121 Am. St. 848, 12 Ann. Cas. 883 (quoting text). And a railroad company has been held liable for breach of contract to furnish a special train for a passenger to get and bring back his son, who had been frozen in a snowstorm and was suffering from blood poisoning, for medical treatment. Burrus v. Nevada &c. Ry., 38 Nev 156, 145 Pac. 926, L. R. A. 1917D, 750.

pected, will not relieve the company from liability.[24] Where there is an express contract, of the character above indicated, to furnish cars at a specified time, the fact that an unavoidable accident prevents the company from performing its contract, will not exonerate it from liability to a shipper who suffers an injury because of the failure to perform the contract.[25]

§ 2223 (1474). Goods requiring unusual facilities—Refrigerator cars.—As we have elsewhere said, a railroad carrier is not, as we believe, bound to make provision for carrying articles of an unusual character requiring for their carriage cars or appli-

[24] Gulf &c. R. Co. v. Hume, 6 Tex. Civ. App. 653, 24 S. W. 915. See also Mauldin v. Seaboard &c. R. Co., 73 S. Car. 9, 52 S. E. 677, 678 (citing text); Gulf City &c. R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829. And in Yazoo &c. R. Co. v. Blum Co., 88 Miss. 180, 40 So. 748, the general rule is laid down that where it accepts property for transportation and issues bills of lading therefor, it thereby assumes by operation of law the obligation to promptly transport and deliver the property and can relieve itself for a failure to do so only by proof that it was prevented by an act of God, a public enemy, the act or conduct of the owner, or a special agreement limiting its duty. For a case in which it was held that there was no express contract as alleged, see McNeer &c. v. Chesapeake &c. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

[25] Shubrick v. Salmond, 3 Burr. 1637. See also Cumbie v. St. Louis &c. R. Co., 105 Ark. 415, 151 S. W. 240; Miller v. Chicago &c. R. Co., 62 Mo. App. 252; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54 and note. The case of Newport &c. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301, lays down a different doctrine from that stated in the text, but, with entire respect for the learned court, we venture to affirm that the rule is correctly stated in the text, for a carrier who contracts absolutely to do a given thing at a specified time, assumes the risks from accidents. Harriman, The, 9 Wall. (U. S.) 161, 19 L. ed. 629; Tirrell v. Gage, 4 Allen (Mass.) 245; Collier v. Swinney, 16 Mo. 484; Harmony v. Bingham, 1 Duer (N. Y.) 209; Place v. Union &c. Co., 2 Hilt. (N. Y.) 19; Scott v. Libby, 2 Johns (N. Y.) 336, 3 Am. Dec. 431; Lorrillard v. Palmer, 15 Johns (N. Y.) 14; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Texas &c. R. Co. v. Nicholson, 61 Tex. 401; Touteng v. Hubbard, 3 Bos. & Paul. 291; Blight v. Page, 3 Bos. & Paul. 295 note; Barker v. Hodgson, 3 M. & S. 267; Paradine v. Jane, Aleyn 26; Medeiros v. Hill, 8 Bing. 231; Osgood v. Groning, 2 Camp. 466; Beatson v. Schank, 3 East 233; Barret v. Dutton, 4 Camp.

ances of a peculiar and unusual construction.[25a] This principle, as it seems to us, requires the conclusion that a railroad carrier is not bound to accept for transportation articles such as can only be safely carried in refrigerator cars, unless it holds itself out as a carrier of that kind or class of property, or because of the general usages of the locality or the general character of the course of business at the termini or points upon the line it can be justly held that there is an implied general duty to provide facilities for safely transporting and caring for that class of property. If, however, the company holds itself out as a carrier of that kind of property, and undertakes to transport it, there is a duty to provide such cars and appliances as will secure the safety of the property.[26] In one of the cases it was held that where the company contracted to transport fruit in refrigerator cars it was bound to procure such cars although it had none of its own, and for an unreasonable delay in procuring such cars was liable for the damages caused by the delay.[27] There is, it is obvious, a clear distinction between cases where a railroad carrier is sought to be held responsible for a refusal to receive and carry goods and a case where it undertakes to carry them. If the goods are such as it does not undertake to carry and is not prepared to

[25a] St. Louis &c. R. Co. v. State, 76 Okla. 60, 184 Pac. 442, 7 A. L. R. 140, 142 (citing text). See also United States v. Pennsylvania R. Co., 242 U. S. 208, 37 Sup. Ct. 95 (tank cars not required).

[26] Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381, citing Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790; Sager v. Portsmouth &c. R. Co., 3 Maine 228, 50 Am. Dec. 659; Great Western R. Co. v. Hawkins, 18 Mich. 427; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Wing v. New York &c. R. Co., 1 Hilt. (N. Y.) 235; Taffe v. Oregon R. &c. Co., 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187, 192 (citing text). See also Forrester v. Southern R. Co., 147 N. Car. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508n; Missouri &c. R. Co. v. McLean, 55 Tex. Civ. App. 130, 118 S. W. 161; International &c. R. Co. v. Welbourne (Tex. Civ. App.), 113 S. W. 780.

[27] International &c. R. Co. v. Young (Tex.), 28 S. W. 819. See also St. Louis &c. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317n, 118 Am. St. 58; Gibson v. Little Rock &c. R. Co., 93 Ark. 439, 124 S. W. 1033; Baker v. Boston &c. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. 937; Nashville &c. R. Co. v. Hopper, 142 Tenn. 200, 217 S. W. 661.

transport, and such as require cars and appliances of a peculiar and unusual kind, then, as we believe, at least where there is no such custom, it may rightfully refuse to accept them for transportation, but if it does receive them for transportation it is liable for damages if injury results because of the insufficiency or unsuitableness of its cars or equipments.[28] Some of the cases contain loose expressions indicating that cars and equipments must be provided that will safely transport any kind of property, but these expressions, when considered, as they must be, as addressed to the facts of the particular case in which they were used, cannot be justly held to lay it down as a general rule that railroad carriers are bound to provide cars and equipments that will safely carry all kinds of property. It is doubtless true that custom and usage exert an important influence upon the question of the duty of a railroad carrier to provide itself with suitable, safe and proper cars and equipments for carrying property of a perishable nature or property which requires for its preservation peculiar means and methods, and it is probably true that where a railroad company accepts a charter to operate a road in a locality where the business involves the transportation of goods from points and markets where perishable fruit and the like are the ordinary and usual commodities of commerce, there is an implied duty to provide itself with suitable and proper cars and equipments for the transportation of that kind of property, and it may be that, under modern conditions and methods, most railroad companies in the United States would be required to furnish refrigeration according to the established custom;[29] but

[28] Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Merchants' Despatch Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Chicago &c. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143; Chicago &c. R. Co. v. Reyman, 166 Ind. 278, 73 N. E. 587, 76 N. E. 970; note to Marks v. New Orleans &c. Co., 107 La. Ann. 172, 31 So. 671, 57 L. R. A. 271, 90 Am. St. 285, 300-302; Johnson v. Toledo &c. R. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. 464; Wetzell v. Chicago &c. R. Co., 12 Mo. App. 599 note; Udell v. Illinois Cent. R. Co., 13 Mo. App. 254. See also Pacific Fruit &c. Co. v. Northern Pacific Ry. Co., 109 Wash. 481, 186 Pac. 852.

[29] See Johnson v. Toledo &c. R. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. 464, 467; New York &c. R. Co. v. Cromwell, 98 Va. 227,

where the property is an extraordinary commodity, where there is no general undertaking to carry that kind of property and no contract to carry it, we believe there is no duty to provide cars and equipments of a peculiar and unusual kind designed and required only for the transportation of that peculiar class of property.

§ 2224 (1475). **Acceptance of perishable property—Cars and equipments.**—As suggested in a preceding section, we think there is a distinction between cases where a railroad carrier accepts goods requiring cars and equipments of an unusual and peculiar character for their transportation, and requiring for their preservation from injury care different in degree and kind from that required in the carriage of ordinary commodities and cases where it lawfully refuses to accept that kind of property. A railroad carrier that accepts for transportation goods of a perishable nature, which require cars and equipments of a peculiar kind, undertakes, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipments, and that it will properly use them in the transportation of such property.[30] In such a case it is no defense that the carrier did not own or control such cars or equipments, for by accepting the

35 S. E. 444, 49 L. R. A. 462, 81 Am. St. 722; Popham v. Bernard, 77 Mo. App. 619. As duty to ice and take care of such property, see St. Louis &c. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317n, 118 Am. St. 58; Southern R. Co. v. Williams, 139 Ga. 337, 77 S. E. 153; Chicago &c. R. Co. v. Davis, 54 Ill. App. 130, affirmed in 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143; Orem &c. Produce Co. v. Northern Cent. R. Co., 106 Md. 1, 66 Atl. 436, 124 Am. St. 462; Brennesen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362, 10 Ann. Cas. 169; St. Louis &c. R. Co. v. Jackson, 55 Tex. Civ. App. 407, 118 S. W. 853; Texas &c. R. Co. v. Davis-Fowler Co. (Tex. Civ. App.), 133 S. W. 309 (ventilation). But compare Wetzell v. Chicago &c. R. Co., 12 Mo. App. 599; Tucker v. Railroad Co., 11 Misc. 366, 32 N. Y. S. 1; McConnell Bros. v. Southern R. Co., 144 N. Car. 89, 56 S. E. 559; Davenport v. Railroad Co., 173 Pa. St. 398, 34 Atl. 59.

[30] St. Louis &c. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802, 803 (citing text); St. Louis &c. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317 and note, 118 Am. St. 58. Suitable cars must be furnished for perishable goods under Interstate Commerce Act. Fort Worth &c. Ry. Co. v. Strickland (Tex.), 208 S. W. 410.

property, with notice, express or implied, of its character, the carrier is precluded from asserting that it did not have the means or facilities for performing the duty it took upon itself.[31] If the carrier gives notice that it has no cars and equipments of the kind required, and, by contract with the owner or consignor, it is agreed that the goods shall be transported in ordinary cars, then the carrier cannot, as we believe, be held liable simply on the ground that it did not provide cars and equipments peculiarly adapted to the carriage of goods of the unusual kind entrusted to it for transportation under the contract. The principle upon which rests the rule that a railroad carrier that accepts goods requiring peculiar cars, equipments and care, must furnish such cars and equipments and exercise such care, authorize the conclusion that, where such carrier agrees to transport goods in a refrigerator car, it impliedly undertakes to exercise such care and diligence as that class of goods requires, although the care and diligence required is greater than that required in the transportation of ordinary commodities.[32]

§ 2225 (1476). Failure to furnish cars—Offer of goods.—A plaintiff who demands damages of a railroad company for a failure to furnish cars must show an offer to bring himself into

[31] Hannibal &c. R. Co. v. Swift, 12 Wall. (U. S.) 262. 20 L. ed. 423; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Helliwell v. Grand Trunk &c. R. Co., 7 Fed. 68; Merchants' &c. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Louisville &c. Ry. Co. v. Carr, 77 Fla. 469, 81 So. 779, 5 A. L. R. 102, 106 (citing text); Paramore v. Western R. Co., 53 Ga. 383; Boscowitz v. Adams &c. Co., 93 Ill. 523, 34 Am. Rep. 191; Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790; Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. 381; Hawkins v. Great Western &c. R. Co., 17 Mich. 57, 97 Am. Dec. 179; Great Western &c. R. Co. v. Hawkins, 18 Mich. 427; Wing v. New York &c. R. Co., 1 Hilt. (N. Y.) 235; Steinweg v. Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673; New York &c. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. 722.

[32] Chicago &c. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143, affirming Chicago &c. R. Co. v. Davis, 54 Ill. App. 130, and citing St. Louis &c. R. Co. v. Dorman, 72 Ill. 504; Indianapolis &c. R. Co. v. Strain, 81 Ill. 504. See also Gibson v. Little Rock &c. R. Co., 93 Ark. 439, 124 S. W. 1033; Philadelphia &c. R. Co. v. Diffendal, 109 Md. 494, 72 Atl. 193, 197 (citing text).

contractual relations with the carrier.[33] Where cars are required there must be a reasonable demand and an offer of goods for transportation.[34] A party who has no goods for transportation cannot hold the carrier liable for a failure to furnish cars.[35] There is, it is obvious, an essential difference between the case of the demand upon a railroad company to furnish cars for the transportation of articles of commerce by the carload, and the case of a demand upon a carrier to transport articles in small quantities. It may, with propriety, be held that the carrier which holds itself out as such must be prepared to receive and transport small quantities of goods upon demand, but such a doctrine cannot be justly applied with the same strictness where the shipper requires cars. Where cars are required by the shipper reasonable notice should be given by him, and a reasonable time allowed the company in which to procure the cars.[36] It cannot be expected that a railroad company will always have cars at a designated place for the transportation of goods in carload lots, and hence it is incumbent upon a shipper to give reasonable notice that cars are required. There may be cases where usage and custom may change the rule, but where there is no usage or custom, we think it safe to say that reasonable notice that cars are wanted must always be given, so that they may be furnished.

§ 2226 (1477). **Cars—Inability to furnish—Burden on carrier to prove an excuse for failure to furnish.**—As the general rule of law requires a railroad carrier to furnish cars for the transportation of the kind of goods it undertakes to carry, and as the facts constituting an excuse for a failure to furnish them

[33] Little Rock &c. R. Co. v. Conatser, 61 Ark. 562, 33 S. W. 1057.

[34] Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; Richardson v. Chicago &c. R. Co., 61 Wis. 596, 21 N. W. 49; Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 576, 28 Am. Rep. 682; Louisville &c. R. Co. v. Flanagan, 113 Ind. 488, 491, 14 N. E. 370, 3 Am. St. 674; Louisville &c. R. Co. v. Godman, 104 Ind. 490, 4 N. E. 163; Pittsburgh &c. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853.

[35] Wilder v. St. Johnsbury &c. R. Co., 66 Vt. 636, 30 Atl. 141. See Missouri &c. R. Co. v. Texas &c. R. Co., 31 Fed. 864.

[36] Pennington v. Douglas &c. Ry. Co., 3 Ga. App. 665, 60 S. E. 485, 488 (citing text); McNeer v. Chesapeake &c. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

when a proper request is made and freight are peculiarly within the knowledge of the carrier, it logically follows that the burden is on the carrier to establish the facts constituting an excuse for the failure to furnish cars.[37] We think that the burden is on the plaintiff to show a proper offer of goods and a request to carry, but that the burden of explaining or excusing a failure to comply with such request is on the carrier. While it is incumbent on the plaintiff to prove such facts, circumstances or conditions as show a duty and the failure or refusal to perform it, he need not go farther and prove that there was no excuse for a failure to do what it was the duty of the defendant under the facts and circumstances to do. Where a tender of charges is essential to impose upon a railroad company the duty to carry, a tender must be shown or an excuse for not making it be proved, but we do not here consider the question as to whether a tender of charges is always necessary.[38]

§ 2227 (1478). Duty of carrier as to cars and equipments—Influence of breach of duty on contracts limiting liability.—A railroad carrier, being an insurer of the goods entrusted to it for transportation, must, for its own protection, provide and properly use cars, equipments and machinery adapted to the carriage of goods of the kind it undertakes to carry. In cases where there is no contract limiting its liability it is not important to the owner, so far as concerns the right to recover for injury to the goods, whether the cars and equipments are suitable and safe or not, for, as indicated, if there be no contract limiting the car-

[37] Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320. Question as to whether sufficient excuse existed as claimed is usually for jury. Dillender v. St. Louis &c. R. Co., 149 Mo. App. 331, 130 S. W. 107; Hashugo v. New York &c. R. Co., 53 Hun. 638, 6 N. Y. S. 836.

[38] Upon the subject of tender of charges, see Wyld v. Pickford, 8 M. & W. 443; Reed v. Philadelphia &c. R. Co., 3 Houst. (Del.) 176; Allen v. Cape Fear &c. R. Co., 100 N. Car. 397, 6 S. E. 105, 35 Am. & Eng. R. Cas. 532; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; Central &c. R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457; Batson v. Donovan, 4 B. & Ald. 21; Carr v. Lancashire &c. R. Co., 7 Exch. 707; 3 Elliott on Ev., § 1907, et seq.

rier's liability, it is liable at all events, except for injuries caused by the act of God or public enemies, or the other causes which exonerates carriers, and the question whether there was or was not negligence on its part is not material,[39] but where there is such a contract the question of negligence or no negligence is one of importance, insomuch as the negligence of the carrier in regard to cars, equipments and appliances, or the use and handling of them, will render contract stipulations limiting the liability ineffective as a protection from liability. Whether there was or was not negligence depends upon the answer to the question whether there was or was not a breach of duty, so that it is important to ascertain what the duty of the carrier is and whether it was performed. It may be said that the general rule is that the carrier is under a duty to properly equip its trains in all respects for the proper and safe transportation of goods of the kind it undertakes to carry, and that the failure to perform this duty is negligence, and will render unavailing stipulations in a contract limiting its liability as a common carrier.[40]

[39] Cleveland &c. R. Co. v. Louisville Tin &c. Co., 33 Ky. L. 924, 111 S. W. 358, 17 L. R. A. (N. S.) 1034, 1036 (citing text).

[40] Insurance Co. v. St. Louis &c. R. Co., 3 McC. (U. S.) 233; New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; York v. Central R. Co., 3 Wall. (U. S.) 107, 113, 18 L. ed. 170; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Helliwell v. Grand Trunk &c. R. Co., 7 Fed. 68; Merchants' &c. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Coupland v. Housatonic &c. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Paramore v. Western &c. R. Co., 53 Ga. 383; Boscowitz v. Adams &c. Co., 93 Ill. 523, 34 Am. Rep. 191; Hoosier Stone Co. v. Louisville &c. R. Co., 131 Ind. 575, 31 N. E. 565; Smith v. New Haven &c. R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Pratt v. Ogdensburg &c. R. Co., 102 Mass. 557; Leonard v. Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667; Levering v. Union &c. Co., 42 Mo. 88, 97 Am. Dec. 320; Bissell v. New York &c. R. Co., 25 N. Y. 442, 82 Am. Dec. 369 and note; Hamilton v. Western &c. R. Co., 96 N. Car. 398, 3 S. E. 164; Hart v. Allen, 2 Watts (Pa.) 114; New Jersey &c. R. Co. v. Kennard, 21 Pa. St. 203; Empire &c. Co. v. Wamsutta &c. Co., 63 Pa. St. 14, 3 Am. Rep. 515; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; Ford v. London &c. R. Co., 2 Fost. & Fin. 730; Lyon v. Mells, 5 East 428; Shaw v. York &c. R. Co., 13 Q. B. 347; Combe v. London &c. R. Co., 31

The duty to provide suitable and safe cars and equipments extends to all appliances and machinery used in operating railroad trains, such as brakes, engines, and the like, and the term "cars and equipments," as used by us, is to be understood as meaning all appliances of every kind and description used in loading, operating, managing and moving trains. The general rule, where there is no special contract, is that if there is a want of due care and diligence in procuring, keeping in repair, or in using any appliance, no matter what its office or character, there is liability. Many of the cases cited in the note directly support this conclusion, and the principle upon which all the adjudged cases unite sustain it. Care must be exercised to provide such cars and equipments as will protect the goods accepted for carriage from injury by the elements, as from cold, heat, and the like, and regard must be had to the nature of the article accepted for transportation, the season, and matters of a similar character.[41] It is obvious that, whether there was or was not negligence in the particular instance, is often a question for the jury, as the existence or non-existence of negligence must often depend upon the conditions and circumstances of the special case.

§ 2228 (1479). **Facilities for transportation—Yards—Depots.**—In another place we have treated of the duty to establish stations, and at this place shall treat of the subject of providing

L. T. R. (N. S.) 613. See generally Chicago &c. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824. 27 Ill. App. 404; St. Louis &c. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Illinois &c. R. Co. v. Baches, 55 Ill. 379; Chicago &c. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143; Costello v. Syracuse &c. R. Co., 65 Barb. (N. Y.) 92; Welsh v. Pittsburg &c. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Scofield v. Lake Shore &c. R. Co., 2 Int. Com. 67; Rice v. Western &c. R. Co., 3 Int. Com. 162. But compare Densmore &c. Co. v. Duluth &c. R. Co., 101 Wis. 563, 77 N. W. 904.

[41] Beard v. Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280; Levering v. Union &c. Co., 42 Mo. 88, 97 Am. Dec. 320; Insurance Co. v. St. Louis &c. R. Co., 3 McCr. (U. S.) 233; Mason v. Missouri &c. R. Co., 25 Mo. App. 473. See also Illinois Cent. R. Co. v. Holt, 29 Ky. L. R. 135, 92 S. W. 540; Burroughs v. Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875; Chicago &c. R. Co. v. Williams, 61 Nebr. 608, 85 N. W. 832, 55 L. R. A. 289; Berry v. Chicago &c. R. Co., 24 S. Dak. 611, 124 N. W. 859.

stations only in so far as it relates to the general duty of railroad carriers of things to furnish facilities for the transportation of goods of the kind they undertake to carry. Under the rule that it is the duty of railroad companies to duly provide and properly use facilities for the transportation of goods, it is held to be under an obligation to furnish what has been called "stational facilities."[42] This duty does not extend so far as to require a railroad company to provide warehouses for the storage of goods to be transported at some future time, since the duty of a railroad company in its capacity of a common carrier is to accept and transport goods tendered it for transportation, and not to take charge of goods intended for transportation at a future day, but not offered for the purpose of transportation. The rule which excuses a carrier from transporting in cases where an extraordinary press of business[43] has exhausted its facilities excuses it as we believe, for a failure to provide facilities for receiving and taking care of an extraordinary quantity of goods, although offered for transportation. Whether depots,[44] station buildings, yards, pens, chutes, or the like, are sufficient, must, it is evident, depend in a great measure upon the demands of traffic at the place where they are located, the custom and usage of business,

[42] Covington &c. R. Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73. In the case cited it was said: "In respect to the mere loading and unloading of live stock, it is only required to furnish such facilities as are reasonably sufficient." We suppose that the general rule is that station buildings, depots, yards and the like must be reasonably sufficient, and that the company is not bound to use extraordinary efforts to provide facilities that will meet all demands, but that they must be such as will meet the ordinary requirements of traffic at the place where they are located. See McCullough v. Wabash &c. R. Co., 34 Mo. App. 23; Lackland v. Chicago &c. R. Co., 101 Mo. App. 420, 74 S. W. 505; Mason v. Missouri Pac. R. Co., 25 Mo. App. 473. "When terminal yards are necessary, they must be provided by a railroad to facilitate its business of transportation." Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 317 (citing text).

[43] Ante, § 2213. See also Casey v. Railway Co., 37 Tex. Civ. App. 49, 83 S. W. 20.

[44] As to what is a depot, see Maghee v. Camden &c., 45 N. Y. 514, 520, 6 Am. Rep. 124; St. Louis &c. R. Co. v. State, 61 Ark. 9, 31 S. W. 570; State v. Texas &c. Ry. Co. (Tex. Civ. App.), 173 S. W. 900.

and matters of a similar nature, for it is clear that facilities sufficient in one locality and under some circumstances might not be sufficient in other localities and under different circumstances and conditions. The question of the sufficiency of such facilities must often be largely one of fact, since it cannot always be determined without a consideration of surrounding circumstances; but when there is no controversy as to the facts, or the facts are within the judicial knowledge, then the question, as we conceive, is one of law, for it cannot be that the question can depend upon the views of this or that jury.[45]

§ 2229 (1480). Selection of cars by shipper.—The rule holding railroad carriers bound to furnish cars adapted to the goods they undertake to transport does not apply where the shipper, with full means and opportunities of knowledge, voluntarily selects the car on which he desires his property transported. The carrier is not responsible in such a case for damages resulting from the unsuitableness of the car. If, however, the carrier fails to disclose hidden defects, which it was his duty to reveal, it will be responsible for injuries to the goods,[46] attributable to such defects. There is no violation of principle in holding that where the shipper exercises his own judgment, is not deceived or misled by the carrier, and furnishes or chooses a car for the

[45] For cases as to liability for defective cattle pens and the like, see Cooke v. Railway Co., 57 Mo. App. 471; Lackland v. Chicago &c. R. Co., 101 Mo. App. 420, 74 S. W. 505; Texas &c. R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855; Candee v. New York &c. R. Co., 73 Conn. 667, 49 Atl. 17 (carrier held not liable under circumstances of this case). See generally St. Louis &c. R. Co. v. Cavender, 170 Ala. 601, 54 So. 54 (duty to furnish proper facilities such as stockyards); Colorado &c. R. Co. v. Breniman, 22 Colo. App. 1, 125 Pac. 22; Louisville &c. R. Co. v. Thompson, 144 Ky. 765, 139 S. W. 939; Allen v. Chicago &c. R. Co., 82 Nebr. 726, 118 N. W. 655, 23 L. R. A. (N. S.) 278 (bedding for live stock); Feniberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33; International &c. R. Co. v. McCullough (Tex. Civ. App.), 118 S. W. 558 (duty to furnish reasonably safe pen for cattle unloaded en route).

[46] Carr v. Schafer, 15 Colo. 48, 24 Pac. 873 (distinguishing Merchants' &c. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757). See also Harris v. Northern Ind. R. Co., 20 N. Y. 232.

transportation of his property, the carrier is not answerable for the sufficiency of the car, at least where the shipper selects the car in consideration of a reduced rate, or the like, for in such a case he does not trust to the carrier nor rely upon the duty of the carrier, but, on the contrary, freely exercises his right of choice, and relies entirely upon his own judgment, so that there is no reason for affirming that the carrier was guilty of any wrong.[47] But the mere fact that the shipper has knowledge of defects in cars or equipments will not absolve the carrier from liability.[48] There is, it is obvious, an essential difference between a case where the shipper, with opportunities and means of knowledge, selects a car not adapted to or suitable for the transportation of his goods, and injury results solely because of the unsuitableness of the car, and cases where the car is defective and the loss is caused by the defect, since the shipper may justly be regarded as competent to determine for himself whether the car is adapted to the use which he desires made of it but where there are hidden defects known to the carrier which cause the injury, the shipper can hardly be said to assume the risks from such defects in the absence of a contract wherein he assumes such risks.[49]

[47] Edward Frohlich Co. v. Pennsylvania Co., 138 Mich. 116, 101 N. W. 223, 224 (quoting text), 110 Am. St. 310; Harris v. Northern &c. R. Co., 20 N. Y. 232. See also Central &c. R. Co. v. Chicago Varnish Co., 169 Ala. 287, 53 So. 832; Ragsdale &c. v. Southern &c. R. Co., 119 Ga. 627, 46 S. E. 832; Densmore &c. Co. v. Duluth &c. R. Co., 101 Wis. 563, 77 N. W. 904.

[48] Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; St. Louis &c. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Forrester & Co. v. Southern R. Co., 147 N. Car. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508n, 15 Ann. Cas. 143. See also Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Chicago &c. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. 143; Cincinnati &c. Ry. Co. v. Fairbanks, 90 Fed. 467; Railroad Co. v. Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. 871; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, holding that carrier can not contract against its own negligence in this respect.

[49] See Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Leonard v. Whitcomb, 95 Wis. 646, 70 N. W. 817; Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031; Central &c. R. Co. v. James, 117 Ga. 832, 45 S. E. 223. But it has been held that the bur-

§ 2230 (1481). **Negligence—Handling goods.**—[50]That the liability of common carriers is absolute is true in cases where there is no contract limiting their liability, for as is well-known, they are substantially insurers in such cases,[51] but, as elsewhere said, where there is such a contract the question of negligence is one of importance. If there is no such contract the railroad carrier is liable for the loss of goods entrusted to it in its capacity of a common carrier, except in the limited class of cases already considered in other sections, no matter how great may be its care and diligence.[52] Unavoidable accidents, although they may be the cause of the loss, do not relieve the carrier from liability in cases where there is no limiting contract.[53] If, however, the term "unavoidable accident," or the term "inevitable accident," is to be taken as meaning an occurrence produced by the vis major, or which results solely from what is called the act of God, then, under the settled rule heretofore discussed, it is cor-

den is upon the shipper to show that the defect was not patent where he examined and selected the car himself. Williams v. Central &c. R. Co., 117 Ga. 830, 43 S. E. 980. A distinction much like that suggested in the text is made in Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534. Where it was held that the shipper assumed the risk.

[50] This section is cited in Nashville &c. R. Co. v. Johnson, 60 Ind. App. 416, 419, 106 N. E. 1087, 109 N. E. 912.

[51] There is, of course, a difference between the obligation of a common carrier and that of an insurer who executes a policy of insurance. But in a general sense the railroad carrier is an insurer because of the general nature of the duty imposed upon it by law. See Nashville &c. R. Co. v. Johnson (Ind. App.), 106 N. E. 414, 418 (citing text).

[52] Siordet v. Hall, 4 Bing. 607; Ewart v. Street, 2 Bail. (S. Car.) 157, 23 Am. Dec. 131; McHenry v. Philadelphia &c. R. Co., 4 Harr. (Del.) 448; Merhon v. Holensack, 22 N. J. L. 372; Brousseau v. Ship Hudson, 11 La. Ann. 427; Plaisted v. Boston &c. Co., 27 Maine 132, 46 Am. Dec. 587 and note.

[53] Morning Light, The, 2 Wall. (U. S.) 560, 17 L. ed. 865; Ladd v. Foster, 31 Fed. 827; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145; Chicago &c. R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Merchants' &c. Co. v. Smith, 76 Ill. 542; Hayes v. Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627; Hyde v. Trent &c. Co., 5 Tenn. 389; Oakley v. Portsmouth &c. Co., 11 Exch. 618. In Lipford v. Charlotte &c. R. Co., 7 Rich. (S. Car.) 409, a distinction is made between loss resulting from negligence and loss due to the vis major.

rect to say that the carrier is not liable where the loss is caused solely by an "inevitable accident," but we think that there is a distinction between what are called inevitable accidents and occurrences resulting from the act of God, as storms, tempests, floods, and the like.[54] In some of the cases, however, the term "inevitable accident" has been held to mean the same thing as the term "act of God."[55] It makes no difference how much care and diligence the carrier may exercise, nor what may be the cause of the loss,[56] the carrier is liable where there is no effective protecting contract stipulation, except, of course, where the loss is due to some one of the causes which the law declares shall exonerate the carrier, or is caused by the fault of the shipper or the inherent qualities of the goods. Against loss from decay due to the inherent character of the goods the carrier does not undertake to protect the owner,[57] and, of course, as there is no duty in that regard, there can be no negligence, but if the want of proper care and diligence in handling the goods causes the

[54] Hale v. New Jersey &c. Co., 15 Conn. 539, 39 Am. Dec. 398; Central &c. Boats v. Lowe, 50 Ga. 509; Gordon v. Buchanan, 5 Yerg. (Tenn.) 79; Trent &c. Co. v. Wood, 4 Doug. 287, 26 Eng. C. L. 479; Plaisted v. Boston &c. Co., 27 Maine 132, 46 Am. Dec. 587; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292. See Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115.

[55] Walpole v. Bridges, 5 Blackf. (Ind.) 222; Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. Dec. 128; Neal v. Saunderson, 10 Miss. 572, 41 Am. Dec. 609. See Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; Pittsburgh &c. R. Co. v. Hollowell, 65 Ind. 188, 194, 32 Am. Rep. 63; Tuckerman v. Stephens &c. Co., 32 N. J. L. 320; Crosby v. Fitch, 12 Conn. 410, 31 Am. Rep. 745.

[56] It may not be amiss to bring to mind the fact that there is an essential difference between the liability of railroads as carriers of goods and as carriers of passengers. And see also in cases of mere delay. Bacon v. Cleveland &c. R. Co., 155 Ill. App. 40; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Gulf &c. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45; post, § 2233.

[57] Davidson v. Gwynne, 12 East 381. See also Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252; Pennsylvania R. Co. v. Goetchins, 135 Ga. 170, 68 S. E. 1110; Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

loss there may be negligence and consequent liability. So, upon the same principle, the carrier is not necessarily liable for injury from leakage, fermentation, evaporation, or the like, where it is due to the inherent nature of the goods or to the conduct of the owner or shipper in preparing them for transportation.[58] The statement in a bill of lading that goods were in good condition when received for transportation is held to be a mere admission which may be contradicted, and hence does not conclude the carrier.[59] It is the duty of the carrier to exercise due care in loading or stowing the goods, and a failure to exercise

[58] Hudson v. Baxendale, 27 L. J. Exch. 93; Ohrloff v. Briscall, 1 L. R. P. C. 231; Hunnewell v. Taber, 2 Spr. (U. S. C. C.) 1; Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42. See Tysen v. Moore, 56 Barb. (N. Y.) 442; Cox v. London &c. R. Co., 3 Fost. & Fin. 77; Warden v. Greer, 6 Watts (Pa.) 424; Nelson v. Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Notara v. Henderson, 5 L. R. Q. B. 346; Lister v. Railway Co., 1 K. B. (1903) 878, 72 L. J. K. B. 385. As to the rule where the injury is due in part to fault in packing, see Higginbotham v. Great Northern &c. R. Co., 2 Fost. & Fin. 796; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42 and note. And compare Jordan v. American Express Co., 86 Maine 225, 29 Atl. 980. See generally Arend v. Liverpool &c. R. Co., 64 Barb. (N. Y.) 118; Brig Collenberg, The, 1 Black (U. S.) 170, 17 L. ed. 89; Bradstreet v. Heran, 2 Blatchf. (U. S.) 116; Ship Howard v. Wissman, 18 How. (U. S.) 231, 15 L. ed. 363; McKinlay v. Morrish, 21 How. (U. S.) 343, 16 L. ed. 100; Michalitschke v. Express Co., 118 Cal. 683, 50 Pac. 847; Brown v. Clayton, 12 Ga. 564; Keith v. Amende, 1 Bush (Ky.) 455; Richards v. Doe, 100 Mass. 524; Hazard v. Illinois &c. R. Co., 67 Miss. 32, 7 So. 280; Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431; Howe v. Oswego &c. R. Co., 56 Barb. (N. Y.) 121; Goodman v. Navigation Co., 22 Ore. 14, 28 Pac. 894; Shackt v. Illinois &c. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176; Rothchild Bros. v. Northern Pac. R. Co., 68 Wash. 527, 123 Pac. 1011, 40 L. R. A. (N. S.) 773n (spontaneous combustion). But see where carrier was negligent. Forrester v. Georgia R. &c. Co., 92 Ga. 699, 19 S. E. 811; Trakas v. Charleston &c. R. Co., 87 S. Car. 206, 69 S. E. 209; Missouri &c. R. Co. v. Barnes & Co., 2 Tex. App. Civ. Cas. § 575.

[59] Missouri &c. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693. See Missouri &c. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077; Clark v. Barnwell, 12 How. (U.

such care is actionable negligence,[60] but if the owner voluntarily takes it upon himself to load, with the right of free choice, and there is no act of the carrier misleading him, the carrier will not ordinarily be liable for an injury caused solely by the mode in which the goods were loaded. The carrier cannot, however, compel a shipper to take upon himself a duty which the law requires the carrier to perform, nor require the shipper to do that which is unreasonable.[61] It is, it may be said generally, the duty of the carrier to exercise such care and diligence in handling the goods as the law declares to be reasonable or ordinary care and diligence, and in order to determine what is ordinary or reasonable care and diligence it is necessary, as a general rule, to consider the facts and circumstances of the particular case, for while the generally accepted doctrine is that there are no degrees of negligence, yet it is nevertheless true that what will constitute negligence under some circumstances and conditions may not constitute negligence under other circumstances and conditions.

§ 2231 (1482). Delay in transporting goods—General doctrine.—A railroad carrier is liable for loss caused by unreasonable delay in transporting goods unless the delay is attributable to some cause which exonerates a common carrier from liability.[62] It is the duty of a carrier to deliver goods within a rea-

S.) 272, 13 L. ed. 985; Cox v. Bruce, L. R. 18 Q. B. D. 147; Grant v. Norway, 10 C. B. 665; Miller v. Hannibal &c. R. Co., 90 N. Y. 430. Ante, § 2141.

[60] Hills v. Mackill, 36 Fed. 702; Baxter v. Leland, 1 Blatchf. (U. S.) 526; Levering v. Union &c. R. Co., 42 Mo. 88, 97 Am. Dec. 320.

[61] Joyner v. South Carolina &c. R. Co., 26 S. Car. 49; Rice v. Western &c. R. Co., 3 Int. Com. 162.

[62] Spence v. Norfolk &c. R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578. See generally to such effect and as to what is or is not unreasonable delay: Seaboard Air Line Ry. v. Peritz, 60 Fla. 429, 54 So. 13; Alabama &c. R. Co. v. Eichofer, 100 Ala. 224, 14 So. 56; Johnson v. East Tennessee &c. R. Co., 90 Ga. 810, 17 S. E. 121; Central &c. R. Co. v. Georgia &c. Co., 91 Ga. 389, 17 S. E. 904, 55 Am. & Eng. R. Cas. 606; Pittsburgh &c. R. Co. v. Knox, 177 Ind. 344, 98 N. E. 295; Smith v. Bangor &c. R. Co., 115 Maine 223, 98 Atl. 737; Stevens v. Northern Cent. Ry. Co., 129 Md. 215, 98 Atl. 551; Leonard v. Chicago &c. R. Co., 54 Mo. App. 293; St. Louis &c. R. Co. v. Farmers'

sonable time, as well as to safely transport them,[63] but the duty to prevent delay is of a different character from the duty to protect against loss by robbery or the like.[64] It has been held that where the facilities of the carrier for transportation were sufficient for ordinary purposes and demands, but were not sufficient because of the extraordinary quantity of goods offered for shipment, no action will lie for damages attributable to the delay caused by the extraordinary quantity of goods requiring shipment.[65] Where a railroad company seeks to escape liability for loss caused by delay upon the ground that the freight charges have not been paid, it is competent for the plaintiff to prove the value of the property as tending to show that it had ample

Union &c. Co., 34 Okla. 270, 125 Pac. 894; Harby v. Southern R. Co., 75 S. Car. 321, 55 S. E. 760. The text is quoted in Regan v. Adams Express Co., 49 La. Ann. 1579, 22 So. 835, 838, but an offer by the company to delay twelve hours to water stock was held not unreasonable.

[63] Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Illinois &c. Co. v. Cobb, 64 Ill. 128; Gates v. Chicago &c. R. Co., 42 Nebr. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Nettles v. South Carolina R. Co., 7 Rich. L. (S. Car.) 190, 62 Am. Dec. 409; Raphael v. Pickford, 5 Man. & G. 551. See also Davis v. Jacksonville &c. R. Co., 126 Mo. 69, 28 S. W. 965; Ruppel v. Allegheny &c. R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. Rep. 666; Wells &c. Co. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Rathbone v. Neal, 4 La. Ann. 563, 50 Am. Dec. 579.

[64] The carrier is not an insurer against mere delay and is not liable, in the absence of special contract, unless the delay is unreasonable. Bacon v. Cleveland &c. R. Co., 155 Ill. App. 40; Cormack v. New York &c. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209n, 17 Ann. Cas. 949; St. Louis &c. R. Co. v. Thompson (Tex. Civ. App.), 103 S. W. 684; Delaney v. United States Express Co., 70 W. Va. 502, 74 S. E. 512.

[65] Bouker v. Long Island &c. R. Co., 89 Hun 202, 35 N. Y. S. 23; Pittsburgh &c. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; Galena &c. R. Co. v. Rae, 18 Ill. 486, 68 Am. Dec. 574; Mauldin v. Seaboard &c. R. Co., 73 S. Car. 9, 52 S. E. 677; Wibert v. New York &c. R. Co., 19 Barb. (N. Y.) 36. See also Yazoo &c. R. Co. v. Blum, 89 Miss. 242, 42 So. 282, 11 Ann. Cas. 272; Baker v. St. Louis &c. R. Co., 145 Mo. App. 189, 129 S. W. 436. But compare Joynes v. Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964; Texas &c. R. Co. v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530. In Smith

security for the charges to which it was entitled.[66] The silence of the bill of lading as to the time of delivery is held not to preclude the plaintiff, in an action for loss caused by delay, from showing that the carrier had notice that the delay would be productive of unusual loss or injury.[67]

§ 2232 (1483). Unreasonable delay—What constitutes—Evidence of.—There is no fixed rule of law determining what will or will not constitute an unreasonable delay in all cases. The carrier is in all instances bound to use ordinary care and diligence to avoid unreasonable delay,[68] but many elements must be

v. Cleveland &c. R. Co., 92 Ga. 539, 18 S. E. 977, it was held that where the delay of thirty-six hours was due to the crowded condition of the company's yard, which prevented an earlier delivery the company was not liable, but the facts in the case and the provisions of the bill of lading were somewhat peculiar so that it can not be justly considered as laying down a general rule. Carriers should give notice to the shipper of probable delay and they have been held liable in such cases for unreasonable delay where they ought to have known that it was likely when they accepted the shipment, gave no such notice and made no stipulation in regard to it even though increased traffic or the like caused the delay. Florida East Coast R. Co. v. Peters, 72 Fla. 311, 73 So. 151; Warren Land Co. v. Chicago &c. Ry. Co., 195 Ill. App. 157; Burns Grain Co. v. Erie R. Co., 102 Misc. 28, 168 N. Y. S. 154; post § 2236.

[66] Leach v. New York &c. Co., 89 Hun 377, 35 N. Y. S. 305. But it seems to us that the doctrine of the case cited requires limitation. It has also been held that even if a railroad company may withold the goods for the purpose of ascertaining whether a bill of lading or waybill states the correct amount of charges due, the company can hold the goods only for a reasonable time. Beasley v. Baltimore &c. R. Co., 27 App. (D. C.) 595, 6 L. R. A. (N. S.) 1048n.

[67] Central &c. Co. v. Savannah &c. R. Co., 69 Fed. 683. As to what is not a sufficient excuse where goods are not sent by the particular vessel agreed on, or the like, see Northern Pac. R. Co. v. American &c. Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269. As to profits lost by delay see Chapman v. Fargo, 223 N. Y. 32, 119 N. E. 76, L. R. A. 1918F, 1049 and note, Ann. Cas. 1918E, 1054.

[68] Ruppel v. Allegheny &c. R. Co., 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. 666. See generally Cincinnati &c. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797; Prussia, The, 100 Fed. 484; Denman v. Railroad Co., 52 Nebr. 140, 71 N. W. 967; Railroad Co. v. O'Donnell 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. 579; Chicago &c. R. Co. v. Gillett (Tex. Civ. App.), 99 S. W. 712, 713 (cit-

taken into consideration in determining whether there was or was not unreasonable delay in the particular instance. The fact that there was unusual delay does not always show a breach of duty. There may be cases where duty requires that a course should be pursued which will cause delay.[69] It is, indeed, the duty of the carrier to delay if delay be necessary to avoid the exposure of the goods to unusual danger.[70] In determining whether there was or was not unreasonable delay in transporting and delivering the goods, it is proper to consider whether ordinary care and diligence were exercised in selecting the route, whether there was or was not an improper or unnecessary deviation from the route usually traversed, and like facts and circumstances.[71] The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable,[72] but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts

ing text); Gulf &c. R. Co. v. Porter, 25 Tex. Civ. App. 491, 61 S. W. 343; Ryland &c. v. Chesapeake R. Co., 55 W. Va. 181, 46 S. E. 923.

[69] Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Davis v. Garrett, 6 Bing. 716. The principle which supports the cases holding that necessity may justify or excuse a deviation from the usual route sustains the doctrine stated in the text. Urquhart v. Barnard, 1 Taunt. 450; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235. We may note in passing, although somewhat aside from the direct path, that the cases relating to carriage by vessels hold that the question whether there was or was not a deviation is one of law, to be determined by the court upon the facts proved. Suydam v. Marine &c. Co., 2 Johns. (N. Y.) 138; Graham v. Commercial &c. Co., 1 Johns. (N. Y.) 352; Jackson v. Betts, 9 Cow. (N. Y.) 208; Newell v. Hoadly, 8 Conn. 381. But we think that the doctrine of the cases referred to can not be applied to railroad carriers in its full extent, but must be materially qualified and limited.

[70] Empire &c. Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178.

[71] Atlanta &c. R. Co. v. Texas &c. Co., 81 Ga. 602, 9 S. E. 600; Lowe v. East Tenn. &c. R. Co., 90 Ga. 85, 15 S. E. 692. See also Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; McGraw v. Railroad Co., 18 W. Va. 361, 41 Am. Rep. 696; St. Louis &c. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21.

[72] Illinois Central R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83.

and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury,[73] under proper instructions. Where the delay is an unusual one, and is not explained, it is held that it is prima facie evidence of negligence, but that, in a case where there is only a slight delay, the rule is different.[74]

§ 2233 (1484). Delay—Accidents and obstructions.—The rule in relation to liability for delays in the course of transportation is not so rigorous as that which governs in cases where goods are lost by theft, fraud, or the like.[75] A railroad carrier is not an insurer against the occurrence of delays, and hence is not liable where the delay is attributable to misfortune or unavoidable accident.[76] Accidents which prevent the running of

[73] Chinn v. Chicago &c. R. Co., 100 Mo. App. 576, 75 S. W. 375; Bosley v. Baltimore &c. R. Co., 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871 (citing text); Chicago &c. R. Co. v. Gillett (Tex. Civ. App.), 99 S. W. 712, 713 (citing text). And the uncontradicted evidence may show that there was no unreasonable delay as a matter of law. Smith v. Cleveland &c. R. Co., 92 Ga. 539, 18 S. E. 977.

[74] Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Davis v. Jacksonville &c. R. Co., 126 Mo. 69, 28 S. W. 965; Dawson v. Chicago &c. R. Co., 79 Mo. 296. In McElwain v. Union Pac. R. Co., 101 Nebr. 484, 163 N. W. 845, 1 A. L. R. 533n, the burden is held to be on the carrier to prove that unreasonable delay was not caused by its negligence, even though the owner of the live stock accompanied the shipment.

[75] Taylor v. Great Northern Ry. Co., L. R. 1 C. P. 385; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415 and note; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521. See ante, § 2207.

[76] Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772; Railway Co. v. Burrows, 33 Mich. 6; Burnham v. Railway Co., 81 Miss. 46, 32 So. 912; Ballentine v. North Missouri &c. R. Co., 40 Mo. 491; Conger v. Hudson R. &c. R. Co., 6 Duer (N. Y.) 375; Wibert v. New York &c. R. Co., 12 N. Y. 245; Geismer v. Lake Shore &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287; Railway v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Gulf &c. R. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45; International &c. R. Co. v. Harpres, 3 Tex. Civ. App. 20, 21 S. W. 622; Nudd v. Wells, 11 Wis. 408; Hughes v. Great Western &c. R. Co., 14 C. B. 637; Hales v. London &c. Co., 4 Best & S. 66; Wren v. Eastern &c. R. Co., 1 L. T. R. (N. S.) 5.

trains will, if not due to the fault of the carrier, excuse delay.[77] Where, however, the railroad carrier is guilty of negligence which causes the accident to which the delay is attributable, it will be liable for the damages resulting from the delay.[78]

§ 2234 (1485). **Accidents do not terminate the duty of the carrier.**—An accident may exonerate the carrier from loss resulting from delay, but an accident will not put an end to the carrier's duty. It is the duty of the carrier, although delay may be caused by an accident, to exercise reasonable care and diligence to transport the goods. The contract of carriage must, as a rule, be completed.[79] As soon as the impediment to the transportation is removed, or as soon as it can be overcome by the exercise of care and diligence, the carrier must, without further delay, complete the carriage.[80]

§ 2235 (1486). **Care of goods during delay.**—The fact that an accident occurs which excuses delay does not relieve the carrier from the duty to exercise due care to protect the goods from loss or injury during the delay. The authorities require the conclusion that the carrier is at all times responsible for the safe keeping of property in its possession,[81] and that the happening of

[77] Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Ballentine v. North Missouri &c. R. Co., 40 Mo. 491, 93 Am. Dec. 315; Conger v. Hudson River &c. R. Co., 6 Duer (N. Y.) 375; Livingston v. New York &c. R. Co., 5 Hun (N. Y.) 562; Michigan &c. R. Co. v. Burrows, 33 Mich. 6.

[78] See Missouri &c. R. Co. v. Truskett, 104 Fed. 728, affirmed in 186 U. S. 480, 22 Sup. Ct. 943, 46 L. ed. 1259. See also Daoust v. Chicago &c. R. Co., 149 Iowa 650, 128 N. W. 1106, 34 L. R. A. (N. S.) 637n; Hall Grain Co. v. Louisville &c. R. Co., 148 Mo. App. 308, 128 S. W. 42; Lamont &c. Co. v. Nashville &c. R. Co., 56 Tenn. (9 Heisk.) 58; Blackstock v. New York &c. R. Co., 20 N. Y. 48, 75 Am. Dec. 372.

[79] Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Lowe v. Moss, 12 Ill. 477; Evans v. Hutton, 5 Scott, N. R. 670.

[80] Baltimore &c. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; Hadley v. Clarke, 8 T. R. 259. See also Burnham v. Railroad Co., 81 Miss. 46, 32 So. 912; Greismer v. Lake Shore &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

[81] King v. Shepherd, 3 Story (U.

an accident does not relieve it from such responsibility. The carrier is under a duty to take reasonable precautions to preserve the goods from injury,[82] and for a breach of duty must respond in damages.

§ 2236 (1487). Delay—Notice to the owner.—Where the circumstances and conditions are such as cause an unusual delay in the transportation of goods, it is the duty of the carrier to give the consignor or owner notice of that fact. If the railroad carrier accepts the goods with knowledge that delays will occur, and without informing the owner or consignor of that fact, it will be responsible for loss occasioned by the delay, although the delay may be caused by accident.[83] It is laid down by the text-writers that, where the goods are delayed after acceptance for transportation, the owner should be notified of the delay with reasonable diligence.[84]

S.) 349; Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; Pearce v. The Thomas Newton, 41 Fed. 106; Swetland v. Boston &c. R. Co., 102 Mass. 276; Bird v. Cromwell, 1 Mo. 81, 13 Am. Dec. 470; Elliott v. Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602; Notara v. Henderson, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225. See also note in 29 L. R. A. (N. S.) 670.

[82] Baltimore &c. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643, 49 Am. & Eng. R. Cas. 124. In the case cited it was held that where water was poured into a car of grain by a flood, the company was liable because it failed to remove the grain. See also Colach v. Chicago R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 915; White v. Minneapolis &c. R. Co., 111 Minn. 167, 126 N. W. 533; Whittle v. Southern R. Co., 88 S. Car. 172, 70 S. E. 456; International R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323; International &c. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Spann v. Transportation Co., 11 Misc. 680, 33 N. Y. S. 566.

[83] Helliwell v. Grand Trunk &c. R. Co., 7 Fed. 68; Thomas v. Wabash &c. R. Co., 63 Fed. 200; Louisville &c. R. Co. v. Odill, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. 820; Missouri &c. R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410. See also Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Young v. Maine Cent. R. Co., 113 Maine 113, 93 Atl. 48; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Joynes v. Pennsylvania R. Co., 235 Pa. St. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964.

[84] Galena &c. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Great Western &c. R. Co. v. Burns, 60

§ 2237 (1488). Delay—Destruction of goods awaiting transportation by fire.—A railroad company is not liable for the loss of goods destroyed by fire while in its warehouse awaiting transportation unless its negligence was the proximate cause of the loss, for the duty as a common carrier does not attach until it receives the goods in that capacity. It is generally held, however, that where goods are placed in a warehouse and the company undertakes to forward them but negligently delays to do so, it will be liable for the loss of the goods while in the warehouse awaiting transportation.[85] The basis of the liability in such a case is held to be negligence in failing to forward the goods without delay. The company cannot, however, be liable unless there was negligence on its part.[86] There is some difficulty in supporting the doctrine that it is liable because of the delay inasmuch as there is some reason for affirming that the delay can not be justly said to be the proximate cause of the loss of the goods.[87] The cases which hold that where the loss

Ill. 284; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Toledo &c. R. Co. v. Lockhart, 71 Ill. 627; Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659; Great Western &c. R. Co. v. Hawkins, 18 Mich. 427; Michigan &c. R. Co. v. Burrows, 33 Mich. 6; Place v. Union &c. Co., 2 Hilt. (N. Y.) 19; Condict v. Grand Trunk &c. R. Co., 54 N. Y. 500; Empire &c. Co. Wamsutta &c. Co., 63 Pa. St. 14, 3 Am. Rep. 515; Porcher v. Northeastern R. Co., 14 Rich. L. (S. Car.) 181; East &c. R. Co. v. Nelson, 1 Cold. (Tenn.) 272; Southern &c. R. Co. v. Womack, 1 Heisk. (Tenn.) 256; Carter v. Peck, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604. See also where shipment was misdescribed in the notice. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672, 151 N. W. 601.

[85] Missouri &c. Co. v. McFadden (Tex. Civ. App.), 32 S. W. 18, 33 S. W. 853; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Michaels v. New York &c. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Chicago &c. U. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613.

[86] Milligan v. Grand Trunk &c. R. Co., 17 U. C. C. P. 115. See also Blythe v. Denver &c. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615n, 22 Am. St. 403.

[87] Thomas v. Lancaster Mills, 71 Fed. 481. In the case cited it was said, "The loss would have occurred if the barge had arrived at Cairo on the evening of the 28th of December, immediately prior to the fire, and had been moored at the place it occupied. The negligent delay was, standing alone, a remote and not a proximate cause, remotely contributing to the injury as an occasion or condition.

of the goods is caused by a tempest, flood or the like, the carrier is nevertheless liable if its negligence contributed to the loss, support the ruling in the cases cited in the first note to this section,[88] but on the question decided in those cases there is conflict.[89]

§ 2238 (1489). Delay in transporting goods caused by the act of the owner.—Where the delay is caused by the act of the owner or consignor, and not by the negligence of the railroad company, it is not liable for loss caused by such delay. The owner or consignor is not, however, bound to give specific directions that there shall be no delay, for if he properly marks the goods and makes an effective delivery of them to the railroad carrier it is

Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; St. Louis &c. R. Co. v. Commercial &c. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154; Hoadley v. Northern &c. Co., 115 Mass. 304, 15 Am. Rep. 106; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Goodlander &c. Co. v. Standard Oil Co., 63 Fed. 400, 27 L. R. A. 583." See also Hogan Milling Co. v. Union Pac. R. Co., 91 Kans. 783, 139 Pac. 397; Seaboard Air Line R. Co. v. Mullin, 70 Fla. 450, 70 So. 467, L. R. A. 1916D, 982, Ann. Cas. 1918A, 576. The case from which we have quoted cites, among others, upon the subject of concurrent negligence the following cases: Phoenix &c. Co. v. Erie &c. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. ed. 873; Liverpool & Great Western Steam Co. v. Phenix &c. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788; California &c. Co. v. Union &c. Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. ed. 730; Constable v. National &c. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. ed. 903.

[88] Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Michigan &c. Co. v. Curtis, 80 Ill. 324; Wolf v. American &c. Co., 43 Mo. 421, 97 Am. Dec. 406; Read v. St. Louis &c. R. Co., 60 Mo. 199; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527; Dunson v. New York &c. R. Co., 3 Lans. (N. Y.) 265; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712; Condict v. Grand Trunk &c. R. Co., 54 N. Y. 500; Southern &c. Co. v. Womack, 1 Heisk. (Tenn.) 256; San Antonio &c. R. Co. v. Barnett (Tex. Civ. App.), 27 S. W. 676; Davis v. Garrett, 6 Bing. 716.

[89] Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Gleeson v. Virginia &c. R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458; Denny v. New York &c. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Hoadley v. Northern &c. Co., 115 Mass. 304, 15 Am. Rep. 106; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695 and

under a duty to transport them without unreasonable delay.[90] A carrier may be relieved from liability caused by delay although there is no positive wrong on the part of the shipper, for if the mistake of the shipper causes the delay there can be no liability on the part of the carrier. But the carrier must in all cases exercise ordinary care to avoid loss, but what is ordinary care must usually depend upon the facts of the particular case. If the owner assumes to perform an act which will shorten the time and prevent delay the failure on his part to perform what he has undertaken may avail the carrier as an excuse for the delay.[91]

§ 2239 (1490). Directions and instructions of shipper—Duty of obedience to.—A railroad carrier that accepts goods from a shipper is, as a general rule, bound to follow the directions or instructions of the shipper.[92] A wrongful disobedience or a

note. See Thomas v. Lancaster Mills, 71 Fed. 481, 484; Blythe v. Denver &c. R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615n, 22 Am. St. 403; note in L. R. A. 1916D, 988, et seq. See ante, § 2205. As to duty of the carrier where act of God has occurred or is threatened, see note in L. R. A. 1916D, 981.

[90] Gregory v. Wabash &c. R. Co., 46 Mo. App. 574. See also Belcher v. Missouri &c. R. Co., 92 Tex. 593, 50 S. W. 559.

[91] Illinois &c. R. Co. v. Miller, 32 Ill. App. 259. See also Cobb &c. Co. v. Illinois Cent. R. Co., 88 Ill. 394; Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86, 87, 21 S. W. 426 (refusal to pay freight). But compare Georgia &c. R. Co. v. Elliott, 3 Ga. App. 773, 60 S. E. 363; Gulf &c. R. Co. v. Maetze, 2 Tex. Civ. App. Cas. § 631; Trevelen v. Northern Pac. R. Co., 89 Wis. 598, 62 N. W. 536.

[92] In Express Co. v. Kountze, 8 Wall. (U. S.) 342, 353, 19 L. ed. 457, the court said, in speaking of carriers: "They are required to follow the instructions and directions given by the owner of the property concerning its transportation whenever practicable." See also Streeter v. Horlock, 1 Bing. 34; Dunseth v. Wade, 3 Ill. (2 Scam.) 285; Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Merchants' &c. Co. v. Kahn, 76 Ill. 520; Marckwald v. Oceanic &c. Co., 11 Hun (N. Y.) 462; Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119. See generally Philadelphia &c. Co. v. Beck, 125 Pa. St. 620, 17 Atl. 505, 11 Am. St. 924; Robinson v. Merchants' &c. R. Co., 45 Iowa 470; Stewart v. Merchants' &c. Co., 47 Iowa 229, 29 Am. Rep. 476; Smith Bros. & Co. v. New Orleans &c. R. Co., 106 La. 11, 30 So. 265, 54 L. R. A. 923, 87 Am. St. 285; Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659; Clark v. St. Louis &c. R. Co.,

negligent failure to obey the directions of the shipper will render ineffective the stipulations of a contract limiting the liability of the carrier. There may, however, be causes which will not only excuse but will require a departure from the directions or instructions of the shipper.[93] But where instructions are not followed the burden is on the carrier to show a sufficient excuse for departing from them.

§ 2240 (1491). Fraud of shipper.—In analogy to the principle which frees the carrier from liability where the loss is attributable to the negligence of the shipper it is held that the fraud of the shipper may relieve the carrier from responsibility.[94] In one of the cases it was held that where a shipper, in order to obtain lower rates, shipped in a basket tied with a rope, valuable

64 Mo. 440; Wichita Poultry Co. v Southern Pac. Ry. Co., 197 Mo. App. 578, 198 S. W. 82; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Rogers v. Wheeler, 52 N. Y. 262; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Galveston &c. R. Co. v. Allison, 59 Tex. 193; Gulf &c. R. Co. v. Irvine (Tex. Civ. App.), 73 S. W. 540.

[93] Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Lord &c. Co. v. Texas &c. R. Co. (Mo. App.), 134 S. W. 111; Johnson v. New York &c. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Regan v. Grand Trunk &c. R. Co., 61 N. H. 579.

[94] Earnest v. Express Co., 1 Woods (U. S.) 573; St. John v. Express Co., 1 Woods (U. S.) 612; Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89; Brasher v. Denver &c. R. Co., 12 Colo. 384; Everett v. Southern &c. Co., 46 Ga. 303; Chicago &c. P. Co. v. Thompson, 19 Ill. 578; Oppenheimer v. United States &c. Co., 69 Ill. 62, 18 Am. Rep. 596; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 126; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Relf v. Rapp, 3 Watts & Serg. (Pa.) 21, 37 Am. Dec. 528; McCance v. London &c. R. Co., 7 H. & N. 477; Bradley v. Waterhouse, 1 Moo. & Mal. 154; Gibbon v. Paynton, 4 Burr, 2298; Batson v. Donovan, 4 B. & Ald. 21. See Walker v. Jackson, 10 M. & W. 161; Southern Express Co. v. Wood, 98 Ga. 268, 25 S. E. 436; Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215, 216 (citing text); Little v. Boston &c. R. Co., 66 Maine 239; Phillips v. Earle, 8 Pick. (Mass.) 182; Mobile &c. R. Co. v. J. T. Phillips & Co., 103 Miss. 536, 60 So. 572; Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481.

silks, laces and silverware and remained silent when he heard the agent of the carrier designate and bill the property as "household goods," the shipper was guilty of such a fraud as relieved the carrier from liability.[95] So, in a recent case, a misdescription, although without fraudulent intent, was held to relieve the carrier from liability for loss of the goods, above the value of those described, where the freight rate was materially higher on the goods actually shipped and misdescribed.[96] Where the fraud, or, indeed, the mistake of the owner or consignor is the cause of a misdelivery of the goods the carrier is not liable, unless the carrier, having received information of the mistake is guilty of negligence in failing to make a proper delivery of the goods.[97]

§ 2241 (1492). Negligence of owner—Packing and loading goods.—The owner of goods can not hold a carrier liable where the loss or injury is the result of his own fault or that of the

[95] Shackt v. Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176, citing Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587; Missouri &c. R. Co. v. York (Tex.), 18 Am. & Eng. R. Cas. 623. In Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587, the court denied the doctrine asserted in Kuter v. Michigan Cent. R. Co., 1 Biss. (U. S.) 35, Fed. Cas. No. 7955.

[96] Bottum v. Charleston &c. R. Co., 72 S. Car. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. 610. It is also held in the same case that the carrier may accept as true, without further inquiry, the shipper's marks as to the contents of the package. See also Chesapeake &c. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364. See generally as to the duty of the shipper to inform the carrier of the value of the goods, and the effect of fraud or concealment, Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. 610; Durgin v. American Express Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; Georgia &c. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; J. J. Douglass Co. v. Minnesota &c. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860, and other authorities cited in note in 2 L. R. A. (N. S.) 773.

[97] Erie &c. R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; O'Rourke v. Chicago &c. R. Co., 44 Iowa 526; Mahon v. Blake, 125 Mass. 477; Dobbin v. Michigan &c. R. Co., 56 Mich. 522, 23 N. W. 204; Stimson v. Jackson, 58 N. H. 138; Guillaume v. General Trans. Co., 100 N. Y. 491; Lake Shore &c. R. Co. v. Hodapp, 83 Pa. St. 22; Wernwag v. Philadelphia &c. R. Co., 117 Pa. St. 46, 11 Atl. 868; Southern &c. R.

consignor in loading or packing the goods.[98] There can be no doubt that the doctrine stated is solidly founded on principle, but there is sometimes difficulty in determining whether the fault of the owner or consignor was the cause of the loss of the goods or of the injury to them. It has been held that where the owner or consignor improperly and insufficiently packed and loaded the goods, the carrier is relieved from liability if the loss or injury was attributable to the fault of the owner or consignor, although it had knowledge that the goods were insufficiently and improperly packed and loaded.[99] But, on the other hand, it is held to be the duty of the carrier to see that the car is properly loaded,[1] and that improper packing by the shipper does not relieve the carrier from liability where it has knowledge

Co. v. Kaufman, 12 Heisk. (Tenn.) 161; St. Louis &c. R. Co. v. Ray (Tex. Civ. App.), 127 S. W. 281; Congar v. Chicago &c. R. Co., 24 Wis. 157, 1 Am. Rep. 164.

[98] Goodman v. Oregon &c. Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87; Michellod v. Oregon &c. R. &c. Co., 86 Ore. 329, 168 Pac. 620; Klauber v. American &c. R. Co., 21 Wis. 21, 91 Am. Dec. 452. See also Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252; Miltimore v. Chicago &c. R. Co., 37 Wis. 190; Tex. &c. R. Co. v. Klepper (Tex. Civ. App.), 24 S. W. 567; Payne v. Ralli, 74 Fed. 563; Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961. See as to evidence of negligence, Duncan v. Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952n; Missouri Pac. R. Co. v. Breeding, 4 Tex. App. (Civ. Cas.) 217, 16 S. W. 184. But it is held in a recent case that "a shipper of goods packed in bales and tied with ropes is under no duty to the carrier or its servants to see that the ropes are strong enough to withstand a pull sufficient to move the bale, nor is a bale not tied with ropes having such strength such an inherently dangerous thing as to render the shipper liable for an injury to a teamster who threw his weight upon the rope in moving the bale while on his wagon with such force that when the rope broke he fell to the ground." Cronin v. American Linen Co., 147 Fed. 755.

[99] Ross v. Troy &c. R. Co., 49 Vt. 364, 24 Am. Rep. 144. See also Pennsylvania R. Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215 (but compare Elgin &c. R. Co. v. Bates Mach. Co., 98 Ill. App. 311, affirmed in 200 Ill. 636, 66 N. E. 326); International &c. R. Co. v. Drought (Tex. Civ. App.), 100 S. W. 1011.

[1] Crawford v. Southern R. Co., 56 S. Car. 136, 34 S. E. 80. And the carrier may refuse the goods if in an unfit condition for transportation. Ante § 2214.

thereof and accepts the shipment in that condition.[2] If, however, the carrier has no knowledge of the insufficient packing by the shipper, and could not have discovered it by the exercise of reasonable care, the carrier is not liable for loss or injury caused by such insufficient packing,[3] and this doctrine has been extended to improper loading of live stock by the shipper, even though the carrier could have discovered it, on the ground that the carrier had a right to assume that the shipper had properly loaded the car.[4] The rule is that carriers are not bound to break open packages to ascertain whether the articles contained in the packages are such as they are forbidden to carry,[5] and it seems to us that this rule applies to cases where goods have inherent defects, and requires the conclusion that the carrier is under no obligation to search for inherent defects in goods offered for transportation. Inherent defects in goods delivered to a carrier often cause their destruction, and where the loss is caused by such defects the carrier is not responsible.[6] The principle which relieves the carrier where the loss is attributable to the fault of

[2] Northwestern Marble &c. Co. v. Williams, 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1077n. See also to the same effect, McCarthy v. Louisville &c. R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. 29; Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389; Elgin &c. R. Co. v. Bates Mach. Co., 98 Ill. App. 311, affirmed in 200 Ill. 636, 66 N. E. 326, 93 Am. St. 218.

[3] Louisville &c. R. Co. v. Southern Seating &c. Co., 157 Ky. 772, 164 S. W. 90.

[4] Illinois Cent. R. Co. v. Rogers, 162 Ky. 535, 172 S. W. 948, L. R. A. 1915C, 1220, Ann. Cas. 1916E, 1201. See also Gulf &c. R. Co. v. Wittenbert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, 130 Am. St. 858, 16 Ann. Cas. 1153. But compare Kinnick Bros. v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772; Duncan v. Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952n.

[5] State v. Swett, 87 Maine 99, 47 Am. St. 306; Bennett v. American &c. Co., 83 Maine 236, 23 Am. St. 774; Nitro-Glycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206; State v. Goss, 59 Vt. 266, 59 Am. Rep. 706. As to the power of the legislature to enact statutes respecting the transportation of game or other commodities, see American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. 641; Bennett v. American Express Co., 83 Maine 236, 22 Atl. 159, 23 Am. St. 774.

[6] Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

the owner or consignor, applies to such cases, inasmuch as it is the wrong of the owner in requiring the transportation of such articles that is the proximate cause of the loss or injury. Although it is true that where the loss or injury to the goods is attributable to the negligence of the owner the carrier is relieved from liability, yet the carrier is not relieved unless the negligence of the owner or consignor was the proximate cause of the injury or loss, for the fault of the owner or consignor will not avail the carrier if its own wrong or negligence was the proximate cause of the loss of the goods or of the injury to them.[7]

§ 2242 (1493). Placing goods in an exposed position.— Where a shipper voluntarily places goods intended for shipment in a place of danger the railroad company is not liable for their loss unless the loss was caused by its negligence. The shipper takes the risk, in such a case, of loss caused by the operation of the road in a reasonably careful and skillful mode, but he does not assume the risk of loss caused by the negligence of the company.[8] If the goods are put in a place where the company receives and accepts goods for transportation and are, in fact, delivered to the company, either actually or constructively, then the liability of the company is that of a common carrier. We suppose that where the goods are put by the owner or con-

[7] McCarthy v. Louisville &c. R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. 29. In the case cited it was held that when the carrier relies upon the exception "which rests upon the fault of the shipper, he must bring himself entirely and perfectly within it by negativing all contributory fault of his own." The court cited Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Grey v. Mobile &c. Co., 55 Ala. 387, 28 Am. Rep. 729; South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Louisville &c. R. Co. v. Touart, 97 Ala. 514, 11 So. 756. To the same effect is Northwestern Marble &c. Co. v. Williams, 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1677, 1079 (citing text).

[8] St. Louis &c. R. Co. v. Fire Assn., 55 Ark. 163, 18 S. W. 43; Cook v. Champlain &c. Co., 1 Denio (N. Y.) 91; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356. Carrier is not liable where the owner, without its knowledge, negligently leaves a door open, or the like, and thus causes the loss. St. Louis &c. R. Co. v. Law, 68 Ark. 218, 57 S. W. 258; Hutchinson v. Chicago &c. R. Co., 37 Minn. 524, 35 N. W. 433; Roderick v. Railroad Co., 7 W. Va. 54.

signor in a place on the premises of the company where they are exposed to danger the company is not liable if they were put there without right but that if placed there under a license from the company it would be liable for their loss if caused by its negligence.[9]

§ 2243 (1494). **What law governs—Law of the place—Conflict of laws.**—The general rule is that the law of the place where the contract is made enters as a silent but important factor into the contract. It is true that this general rule is to be taken in connection with the rule that the place of performance is often of controlling effect and also in connection with the rule that the form of the contract and the convention of the parties override the law.[10] But it is to be said of the rule last stated that while it is generally competent for the parties to regulate their rights and liabilities by contract,[11] it is not competent to contract to do a thing forbidden by positive law or by the principles of public policy recognized and enforced by the law of the place where the contract is entered into. The cases fully discuss the question here under immediate consideration and the rule deducible from them is this: where there is no provision or stipulation in the contract expressly or impliedly excluding the law of the place of shipment that law governs, and by it the rights and liabilities of the parties are to be determined.[12] It

[9] In Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 473, 23 L. ed. 356, it was said: "The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was lawful use of its property by the plaintiffs, and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant." Cook v. Champlain &c. Co., 1 Denio (N. Y.) 91; Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178, and note.

[10] Broom's Legal Maxims, 690.

[11] Gott v. Gandy, 23 L. J. Q. B. 1, 2 El. & Bl. 845; Walker v. Birch, 6 T. R. 258; Facey v. Hurdom, 3 B. & C. 213.

[12] Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788 (citing Cox v. United States, 6 Pet. (U. S.) 172, 8 L. ed. 359; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. ed. 104; Watts v. Cam-

seems, however, from the reasoning of the leading English case that the court will accept, as the legal factor, the law the parties had in view at the time of entering into the contract.[13] But we

ors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. ed. 406; Morgan v. New Orleans &c. R. Co., 2 Woods (U. S.) 244; Hale v. New Jersey Navigation Co., 15 Conn. 539, 39 Am. Dec. 398; Dyke v. Erie &c. R. Co., 45 N. Y. 113, 6 Am. Dec. 43; Pennsylvania Co. v. Fairchild, 69 Ill. 260; Railway Co. v. Kavanaugh, 92 Fed. 56; Western &c. R. Co. v. Exposition &c. Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Arnold v. Potter, 22 Iowa 194; Talbott v. Merchants' &c. Co., 41 Iowa 247, 20 Am. Rep. 589; Hazel v. Chicago &c. R. Co., 82 Iowa 477, 48 N. W. 926; Fonseca v. Cunard &c. Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660 (citing Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Forepaugh v. Delaware &c. R. Co., 128 Pa. St. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. 672; Missouri &c. Co., In re, L. R. 42 Ch. Div. 321); Powers &c. Co. v. Wells, Fargo &c. Co., 93 Minn. 143, 100 N. W. 735; First National Bank v. Shaw, 61 N. Y. 283; China Insurance Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. 576; Grand v. Livingston, 73 N. Y. St. 646, 38 N. Y. S. 490, affirmed in 158 N. Y. 688, 53 N. E. 1125; Brooke v. New York &c. R. Co., 108 Pa. St. 529, 56 Am. Rep. 235; Cantu v. Bennett, 39 Tex. 303; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; Berger-Crittenden Co. v. Chicago &c. R. Co., 159 Wis. 256, 150 N. W. 496; Don v. Lippmann, 5 Cl. & F. 1. See upon the general subject, Davis v. Aetna &c. Co., 67 N. H. 218, 34 Atl. R. 464; Palmer v. Atchison &c. R. Co., 101 Cal. 187, 35 Pac. 630; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; McDaniel v. Chicago &c. R. Co., 24 Iowa 412; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321; Brockway v. American Exp. Co., 171 Mass. 158, 50 N. E. 626; Dyke v. Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43; Brown v. Camden &c. R. Co., 83 Pa. St. 316. But see where the intention is to make the law of the place of performance govern, Brown v. Camden &c. R. Co., 83 Pa. St. 316; Curtis v. Delaware &c. R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Herf &c. Co. v. Lackawanna &c. R., 70 Mo. App. 274, 100 Mo. App. 164, 73 S. W. 346. In the case of Fonseca v. Cunard &c. Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660, will be found a valuable collection of cases upon the proposition that a shipper is bound by the printed conditions of the bill of lading, among them Parker v. South Eastern R. Co., L. R. 2 C. P. Div. 416; Harris v. Great Western R. Co., L. R. 1 Q. B. Div. 515; Burke v. South Eastern R. Co., 5 C. P. Div. 1; Quimby v. Liverpool &c. Railroad, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Steers v. Boston &c. Co., 57 N. Y. 1, 15 Am. Rep. 453 and notes.

[13] Missouri &c. Co., In re, L. R.

suppose that what law it was that the parties had in view must be ascertained, ordinarily, at least, from the terms and conditions of the contract, read, as contracts must be, by the light of surrounding circumstances, for, as we believe, a written contract can not be varied by parol either as to the law factor thereof[14] or as to the element of fact which it contains or covers, but there are cases in which extrinsic facts, such as the residence of the parties, the place of performance, or the fact that the law of one state is more favorable than the other, have been held to raise a controlling inference or presumption under the circumstances. A contract for the transportation of goods is regarded as "a single one"[15] and the law which constitutes a factor of the contract, or which acts upon it, influences and controls the contract as a unit and not in severed fragments. It can not, as we conceive, be justly said that the rule that the contract is a unit impinges upon the rule that one of several carriers in a route over which goods are transported is not liable for the negligence or wrongs of the other carriers, for the principle upon which rests the rule that one of several railroad carriers is held liable only for its own negligence or breach of duty is different from

42 Ch. Div. 321. See also as to intention or presumed intention governing Talbott v. Merchants' Dispatch &c. Co., 41 Iowa 247, 20 Am. Rep. 589; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; Lloyd v. Guibert, 6 Best & S. 100, L. R. 1 Q. B. 115; Dyke v Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43. As to refusal to enforce a limitation contrary to public policy of the jurisdiction, see Kensington, The, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. ed. 190; Railroad Co. v. Gardiner, 51 Nebr. 70, 70 N. W. 508. But generally a limitation valid where made will be enforced elsewhere.

[14] Long v. Straus, 107 Ind. 94, 97, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87 and note; Tisloe v. Graeter, 1 Blackf. (Ind.) 353; Dale v. Evans, 14 Ind. 288. "Undoubtedly necessary implication is as much part of an instrument as if that which is so implied was plainly expressed." Per Court in Hudson &c. Co. v. Pennsylvania &c. Co., 8 Wall. (U. S.) 276, 288, 19 L. ed. 349. See also 1 Elliott Ev. § 571.

[15] Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788. See post, § 2264; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; McDaniel v. Chicago &c. R. Co., 24 Iowa 412; Pitman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. 949; The Henry B. Hyde, 82 Fed. 681, 90 Fed. 115.

that upon which the rule declared in the case referred to is founded. It would, therefore, be misleading to broadly affirm that invariably and for all purposes a contract of carriage is to be regarded as "a single contract." And in a recent case it was held that the contract was divisible and that where the property was negligently injured in a state in which the limitation of the carrier's liability by contract was forbidden by public policy, though the property was shipped there under a through bill from a state in which the contract was made and was valid, the courts of the state in which the property was injured would not enforce the contract limiting liability.[16]

§ 2244. What law governs—Interstate shipments.—As elsewhere shown, some important changes are made by the interstate commerce act, including the Hepburn Act and the Cormack and Cummins amendments. Contracts of interstate shipment are governed and to be construed with reference to the federal laws and decisions upon the subject regardless of the rules upon

[16] Hughes v. Pennsylvania R. Co., 202 Pa. St. 222, 51 Atl. 990, 63 L. R. A. 513, 90 Am. St. 713. The court cites Burnett v. Pennsylvania R. Co., 176 Pa. St. 45, 34 Atl. 972, and Pittsburgh &c. R. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. 732. See also Southern Express Co. v. Gibbs, 155 Ala. 303, 146 So. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. 24; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Carpenter v. Grand Trunk R. Co., 72 Maine 388, 39 Am. Rep. 340; Cleveland &c. R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. 275, but it is doubtful if these cases fully support the principal case, and, as a general rule, such contracts are regarded as entire and indivisible. See generally Southern Express Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Hazel v. Chicago &c. R. Co., 82 Iowa 477, 48 N. W. 926; Chicago &c. R. Co. v. Gardiner, 51 Nebr. 70, 70 N. W. 508; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; note in 18 L. R. A. (N. S.) 874; post § 2264. It would seem that the duty and liability with respect to the care of the property after arrival at its destination may be determined by the law of the state of the destination. Springs v. South Bound R. Co., 46 S. Car. 104, 24 S. E. 166. As to whether it is an interference with interstate commerce, see Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268; Davis v. Chicago &c. R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935.

the subject covered by such laws otherwise prevailing in the local jurisdiction.[17]

[17] Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, and note; Potter v. Kansas City &c. Ry. Co., 187 Mo. App. 56, 172 S. W. 1153. See further, last section in next following chapter; also Charleston &c. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. ed. 1137, Ann. Cas. 1916D, 333; New York Cent. &c. R. Co. v. Beaham, 242 U. S. 148, 37 Sup. Ct. 43, 61 L. ed. 210; Chicago &c. R. Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. ed. 328.

CHAPTER LXX

CONTRACTS LIMITING LIABILITY

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§ 2250 (1495). **The English rule.**—It has long been the custom for carriers to include in their bills of lading provisions limiting their liability as insurers, and when such provsions are voluntarily agreed to, or accepted by the shipper, they become binding upon him in so far as they are lawful and not prohibited

by statute or against public policy. In England, it was held at a very early date that such a limitation might be made, not only by express contract but also by notice to the owner of the goods.[1] It was even held that this might be done by a general public notice, brought to the knowledge of the shipper.[2] This rule, however, gave rise to so much uncertainty, confusion and injustice, that certain acts known as the "Land Carrier's Act" and the "Railway and Canal Traffic Act" were passed, in 1830 and in 1854 respectively, to regulate the matter. Under the former act it was held that, although public notices would no longer be sufficient, a special contract or notice might be enough to protect the carrier against liability for loss or injury to any of the articles enumerated in the act, even though occasioned by the negligence of its servants.[3] Under the latter act, however, carriers are prohibited from limiting their liability, except as to the articles named in the prior act, by "any notice, condition or declaration," unless it is in writing and signed by the shipper, or other proper party, and unless the conditions or limitation shall also be "adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable."[4] It has been held under this act, as formerly, that where alternative rates are given, a condition in the contract signed by the shipper that in consideration of the lower rate the carrier shall not be liable even for the negligence of itself or servants is reasonable and valid.[5]

[1] Nicholson v. Willan, 5 East, 507; Maving v. Todd, 1 Starkie, 59; note to Southcote's Case, 4 Coke, 83; Gibbon v. Paynton, 4 Burr. 2298; Smith v. Horne, 8 Taunt. 144. The English cases are reviewed in Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470, and Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627. See also note in 88 Am. St. 77.

[2] See authorities cited in last note, supra.

[3] See 1 Hodges Railways (7th ed.), 563, 574.

[4] See 1 Hodges Railways (7th ed.), 564, 565; Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473, 32 L. J. Q. B. 241; Simons v. Great Western R. Co., 18 C. B. 805, 829.

[5] Lewis v. Great Western R. Co., L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. 131; Manchester &c. R. Co. v. Brown, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124; White v. Great Western &c. R. Co., 2 Com. B. (N. S.) 7, 26 L. J. C. P. 158; Beal v. South Devon &c. R. Co., 3 H. &

§ 2251 (1496). Conflict among the American decisions.—In America the question as to the right to limit the extraordinary liability of a carrier seems to have arisen first in New York. It was there held in two well-considered cases, decided about the same time, that such liability could not be limited by a mere general notice, although brought to the knowledge of the shipper, but the question as to the right to limit by an express special contract was not decided.[6] In a case which arose a few years later, however, it was held that this could not be done even by express contract.[7] But this last decision was afterwards disapproved by the highest court of the same state,[8] as well as by many other courts, including the Supreme Court of the United States.[9] It is now held in nearly every state that this liability of the carrier may be limited, to some extent at least, by a special express contract.[10] There is some conflict, however, among the decisions as to how far it may be so limited and as to what is sufficient to constitute a valid special contract. This will more fully appear from a review of the authorities to be considered in the following sections.

Colt. 337. The rule in Canada is similar to that in England. Hamilton v. Grand Trunk R. Co., 23 U. C. Q. B. 600; Spettigue v. Great Western R. Co., 15 U. C. C. P. 315. But the stipulation limiting the liability must be clear and explicit. Pearlmoor, The, L. R. (1904), P. 286, 73 L. J. P. 50.

[6] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

[7] Gould v. Hill, 2 Hill (N. Y.) 623. See also Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Jones v. Voorhees, 10 Ohio 145.

[8] Dorr v. New Jersey &c. Co., 11 N. Y. 485, 62 Am. Dec. 125, and note.

[9] New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465.

[10] See post, § 2255. See also notes in 32 Am. Dec. 497; 82 Am. Dec. 379; 5 Am. St. 725; 3 L. R. A. 343; 13 L. R. A. 518; 3 Am. & Eng. R. Cas. 272; 88 Am. St. 77, et seq.; 19 Ann. Cas. 803; 13 L. R. A. (N. S.) 753. Most of the authorities are collected and reviewed in the notes just referred to. See, however, under constitutional or statutory provisions in a few states, Wabash R. Co. v. Sharp, 76 Nebr. 424, 107 N. W. 758; Gulf &c. R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. 494; Missouri &c. R. Co. v. Carter, 95 Tex. 461, 68 S. W. 159; Chesapeake &c. R. Co. v. Pew, 109 Va. 288, 64 S. E. 35; Liquid Carbonic Co. v. Norfolk &c. R. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753n. See also last section in this chapter.

§ 2252 (1497). **No right to contract against liability for negligence in most jurisdictions.**—The rule supported by the great weight of authority is that a common carrier can not by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants.[11]

[11] Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Railway Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Inman v. South Carolina &c. R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. ed. 612; Woodburn v. Cincinnati &c. R. Co., 40 Fed. 731; Eells v. St. Louis &c. R. Co., 52 Fed. 903; Thomas v. Wabash &c. R. Co., 63 Fed. 200; Mobile &c. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Louisville &c. R. Co. v. Grant, 99 Ala. 325, 13 So. 599; Louisville &c. R. Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Little Rock &c. R. Co. v. Talbot, 39 Ark. 523; Little Rock &c. R. Co. v. Talbott, 47 Ark. 97, 14 S. W. 471; Overland &c. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986, 61 Am. & Eng. R. Cas. 302; Union Pac. R. Co. v. Libby, 27 Colo. App. 111, 146 Pac. 1076; Berry v. Cooper, 28 Ga. 543; Central &c. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170; Adams Exp. Co. v. Mellichamp, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D, 976 (and is not affected by Interstate Commerce Act nor by Elkins Act); Indianapolis &c. R. Co. v. Allen, 31 Ind. 394; Michigan &c. R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Insurance Co. v. Lake Erie &c. R. Co., 152 Ind. 333, 53 N. E. 382; Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Chesapeake &c. Ry. Co. v. Jordan, 63 Ind. App. 365, 114 N. E. 461; Rose v. Des Moines &c. R. Co., 39 Iowa 246; Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550, 61 Am. & Eng. R. Cas. 329; Kansas City &c. R. Co. v. Simpson, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; Rhodes v. Louisville &c. R. Co., 9 Bush. (Ky.) 688; Willis v. Grand Trunk R. Co., 62 Maine 488; Fisher v. Boston &c. R. Co., 99 Maine 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. 283; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162 and note; School Dist. v. Boston &c. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534; Witting v. St. Louis &c. R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636, 45 Am. & Eng. R. Cas. 369; Stanard &c. Co. v. White Line &c. Co., 122 Mo. 258, 26 S. W. 704, 61 Am. & Eng. R. Cas. 185; Atchison &c. R. Co. v. Lawler, 40 Nebr. 356, 58 N. W. 968; Merrill v. American Ex. Co., 62 N. H. 514; Paul v. Pennsylvania R. Co., 70 N. J. L. 442, 57 Atl. 139; Branch v. Wilmington &c. R. Co., 88 N. Car. 573; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Union Ex. Co. v. Graham, 26 Ohio St. 595; Seller v.

This rule "rests upon considerations of public policy and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking."[12] The employment of a common carrier is a public one, and the fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary liability of insurers. To permit them to contract against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing and that railroad companies are given many special privileges as corporations for the very reason that they have such duties to perform for the public, there can be no doubt of the justice of this rule, especially as applied to such corporations.[13]

Steamship Pacific, 1 Ore. 409; Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674; Louisville &c. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; St. Louis &c. Ry. Co. v. Miller (Tex. Civ. App.), 190 S. W. 819; Maslin v. Baltimore &c. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Brown v. Adams Ex. Co., 15 W. Va. 812; Nevins v. Chicago &c. R. Co., 124 Wis. 313, 102 N. W. 489, 109 Am. St. 935; Chicago &c. R. Co. v. Calumet &c. Co., 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68, and note on page 95, et seq., citing many of the foregoing and additional authorities. But see Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116. And see as to right to limit liability as to a matter which it is under no duty or obligation to perform as a common carrier. Denver &c. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n, 12 Ann. Cas. 732 and cases cited; and ante § 2101.

[12] Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781, note in 88 Am. St. 95, 96.

[13] This is substantially the line of reasoning pursued by Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627, of which a synopsis is given by Justice Gray in Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788. See also the similar course of reasoning in Davidson v. Graham, 2 Ohio St. 131; Christenson v. American Ex. Co., 15 Minn. 270, 2 Am. Rep.

§ 2253 (1498). **Right to contract against liability for negligence in some jurisdictions.**—In several of the states it seems to be held, contrary to the weight of authority, that a common carrier may contract against liability for negligence. In some of them, however, a distinction is apparently made between slight or ordinary negligence and gross negligence, and it is held that the carrier cannot, by contract, relieve itself from liability from the latter. In some jurisdictions also, in which the right to contract against liability for negligence in the carriage of goods is not recognized a distinction is made as against passengers riding on free passes. The New York rule seems to be that, while a common carrier can not, perhaps, stipulate for an exemption from liability for its own negligence, it may contract against liability for the negligence of its agents or servants in any degree.[14] The rule in Illinois is not entirely free from doubt. It seems, however, that the carrier may limit its liability for ordinary negligence but not for gross negligence.[15] In Wisconsin there are expressions to the same effect in some of the cases.[16]

122. This section is also quoted with approval in McNeill v. Durham &c. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227, 242, 243. See also note in 88 Am. St. 95, 96; Chicago &c. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688; St. Louis &c. R. Co. v. Wallace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A. (N. S.) 379.

[14] French v. Buffalo &c. R. Co., 4 Keyes (N Y.) 108; Smith v. New York &c. R. Co., 24 N. Y. 222; Cragin v. New York &c. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Nicholas v. New York &c. R. Co., 89 N. Y. 370; Ulrich v. New York &c. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369. See also Zimmer v. New York &c. R. Co., 137 N. Y. 460, 33 N. E. 642. And compare Greenwald v. Weir, 59 Misc. 431, 111 N. Y. S. 235.

[15] Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Wabash &c. R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Chicago &c. R. Co. v. Hawk, 42 Ill. App. 322. See also Chicago &c. R. Co. v. Calumet &c., 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68. But see Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587; Wabash &c. R. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641. See review of Illinois cases in note in 88 Am. St. 97, 98. See also Cooper v. Raleigh &c. R. Co., 110 Ga. 659, 36 S. E. 240; Chicago &c. R. Co. v. Gardiner, 51 Nebr. 70, 70 N. W. 508; Rhodes v. Louisville &c. R. Co., 72 Ky. 688.

[16] Black v. Goodrich &c. Co., 55 Wis. 319, 13 N. W. 244, 42 Am.

In some of the states, including Connecticut,[17] Louisiana,[18] Massachusetts,[19] New Jersey,[20] and Wisconsin[21] it has been held that a railroad company may contract with a gratutious passenger against the negligence of its servants. No exemption from liability for negligence, however, will be implied from doubtful language. It must be clearly and unequivocally expressed.[22]

§ 2254 (1499). Right to limit liability prohibited by statute in some states.—In Texas it is expressly provided by statute that, as to shipments within the state, common carriers of goods shall not limit or restrict their liability as it exists at com-

Rep. 713; Lawson v. Chicago &c. R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634. But see Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55. And see Central of Georgia R. Co. v. Broda, 190 Ala. 266, 67 So. 437; Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118; Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768. So, in West Virginia. Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116.

[17] Griswold v. New York &c. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115.

[18] Higgins v. New Orleans &c. R. Co., 28 La. Ann. 133. But prior decisions hold that a carrier of goods, at least, can not contract for exemption of liability for loss by negligence. Roberts v. Riley, 15 La. Ann. 103, 77 Am. Rep. 183; New Orleans &c. R. Co. v. New Orleans &c. Co., 20 La. Ann. 302.

[19] Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652. But as to the general rule, see preceding section and Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131; Hoadley v. Northern Trans. Co., 115 Mass. 304, 15 Am. Rep. 106.

[20] Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Dec. 265.

[21] Annas v. Milwaukee &c. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

[22] Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Adams Ex. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; McKay v. New York &c. R. Co., 50 Hun 563, 3 N. Y. S. 708; Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Kenney v. New York &c. R. Co., 125 N. Y. 422, 26 N. E. 626; Rathbone v. New York &c. R. Co., 140 N. Y. 48, 35 N. E. 418; Zimmer v. New York &c. R. Co., 42 N. Y. St. 63, 16 N. Y. S. 631; Brewster v. New York &c. R. Co., 145 App. Div. 51, 129 N. Y. S. 368. This indeed, is the general rule as to limitations. Saunders v. Railway Co., 128 Fed. 15; post, § 2262.

mon law.[23] It is held, however, that this statute does not apply to foreign or interstate shipments.[24] In Nebraska the constitution forbids a railroad company to limit its liability as a common carrier by special agreement with the shipper.[25] Somewhat similar statutes have been passed in several other states, and in one of them, at least, it has been expressly decided that such a statute is not repugnant to the constitution of the United States as a regulation of commerce.[26]

[23] Galveston &c. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Missouri Pac. R. Co. v. Harris, 1 Tex. App. (Civil Cases) 730; Heaton v. Morgan's &c. Co., 1 Tex. App. (Civil Cases) 425, and cases cited in the following note.

[24] Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Missouri Pac. R. Co. v. International &c. Co., 84 Tex. 149, 19 S. W. 459; Houston &c. Nav. Co. v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. 17. But see McDaniel v. Chicago &c. R. Co., 24 Iowa 412; Ohio &c. R. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; St. Joseph &c. R. Co. v. Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335.

[25] Missouri Pac. R. Co. v. Vandeventer, 26 Nebr. 222, 41 N. W. 998, 3 L. R. A. 129, 37 Am. & Eng. R. Cas. 651; Chicago &c. R. Co. v. Gardiner, 51 Nebr. 70, 70 N. W. 508; Cook v. Chicago &c. R. Co., 78 Nebr. 64, 110 N. W. 718. So in Kentucky. Ohio &c. R. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; Illinois Cent. R. Co. v. Radford, 23 Ky. L. 886, 64 S. W. 511. See also St. Louis &c. R. Co. v. Sherlock, 59 Kans. 23, 51 Pac. 899; Burgher v. Chicago &c. R. Co., 105 Iowa 335, 75 N. W. 192.

[26] Hart v. Chicago &c. R. Co., 69 Iowa 485, 29 N. W. 597; Solan v. Chicago &c. R. Co., 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. 430, affirmed in Chicago &c. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688. See also Nashville &c. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; Chicago &c. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688; Hennington v. State, 90 Ga. 396, 17 S. E. 1009; Adams Exp. Co. v. Mellichamp, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D, 976; Ohio &c. R. Co. v. Tabor, 17 Ky. L. 1411, 36 S. W. 18; Connell v. Western &c. Telegraph Co., 108 Mo. 459, 18 S. W. 883; Armstrong v. Galveston &c. R. Co. (Tex. Civ. App.), 29 S. W. 1117; Galveston &c. R. Co. v. Herring (Tex. Civ. App.), 36 S W. 129; St. Joseph &c. R. Co. v. Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335; Butner v. Western &c. Telegraph Co., 2 Okla. 234, 37 Pac. 1087; Texas &c. R. Co. v. Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125; Richmond &c. R. Co. v. Patterson Tobacco Co., 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511, affirmed in 169 U. S. 311, 18 Sup. Ct. 335,

§ 2255 (1500). Right to limit liability by special contract in most jurisdictions.—The right of a carrier to limit its liability as an insurer is a different thing from the right to contract against liability for its own negligence, which, as we have shown, is generally denied. In nearly all jurisdictions a carrier may make a valid special contract limiting its common-law liability as an insurer.[27] The contract must, however, be freely and fairly

42 L. ed. 759. As to interstate shipments, however, the matter is controlled, ordinarily at least, by the Hepburn Act and Carmack and Cummins Amendments. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257; Missouri &c. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; St. Louis &c. R. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. ed. 917; Adams Exp. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096; Louisville &c. R. Co. v. Miller, 156 Ky. 677, 162 S. W. 73, 50 L. R. A (N. S.) 819n. But compare Adams Exp. Co. v. Mellichamp, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D, 976; Winn v. American Exp. Co., 149 Iowa 259, 128 N. W. 663.

[27] New Jersey &c. R. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 382, 12 L. ed. 465; Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717; Moore v. Duncan, 237 Fed. 780; Mobile &c. R. Co. v. Jarboe, 41 Ala. 644; Camp v. Hartford &c. Co., 43 Conn. 333; Southern Exp. Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53 and note; Western Trans. Co. v. Newhall, 24 Ill. 466, 76 Am. St. 760; Chicago &c. R. Co. v. Hale, 2 Ill. App. 150; Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239; Indianapolis &c. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Pacific Exp. Co. v. Foley, 46 Kans. 457, 26 Pac. 665, 26 Am. St. 107; Fillebrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606; Little v. Boston &c. R. Co., 66 Maine 239; Bankard v. Baltimore &c. R. Co., 34 Md. 197, 6 Am. Rep. 321; Grace v. Adams Exp. Co., 100 Mass. 505, 1 Am. Rep. 131; Pemberton Co. v. New York &c. R. Co., 104 Mass. 144; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; Kellerman v. Railroad, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; McElvain v. St. Louis &c. R. Co., 151 Mo. App. 126, 131 S. W. 736, 743 (citing text); Wall v. Northern Pac. R. Co., 50 Mont. 122, 145 Pac. 291; Parsons v. Monteath, 13 Barb. (N. Y.) 353; Weeks v. New York &c. R. Co., 72 N. Y. 50, 28 Am. Rep. 104; Hill v. Syracuse &c. R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433; Capehart v. Seaboard

made, without extortion,[28] and must also be reasonable[29] and supported by some consideration.[30] The authorities are not all

&c. R. Co., 81 N. Car. 438, 31 Am. Rep. 505; Pittsburgh &c. R. Co. v. Barrett, 36 Ohio St. 448; Haskell v. St. Louis &c. R. Co., 62 Okla. 116, 162 Pac. 459; Bingham v. Rogers, 6 Watts & S. (Pa.) 495, 40 Am. Dec. 581 (but see Jones v. Lehigh &c. R. Co., 202 Pa. 81, 51 Atl. 590); Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Dillard v. Louisville &c. R. Co., 2 Lea (Tenn.) 288; Gulf &c. R. Co. v. Gatewood, 79 Tex. 89, 10 L. R. A. 419 and note; note in 88 Am. St. 77 et seq.; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349 and note; Virginia &c. R. Co. v. Sayers, 26 Grat. (Va.) 328; Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; ante, § 2251.

[28] Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148; Adams Exp. Co. v. Nock, 63 Ky. 562, 87 Am. Dec. 510; Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Little Rock &c. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. 230; Kirby v. Western Union Tel. Co., 4 S. Dak. 439, 57 N. W. 199, 30 L. R. A. 612; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776 and note.

[29] Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788; Central Vt. R. Co. v. Soper, 59 Fed. 879; Alabama &c. R. Co. v. Little, 71 Ala. 611; Little Rock &c. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. 230; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332 and note; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; New Orleans &c. R. Co. v. Faler, 58 Miss. 911; Tarbell v. Royal &c. R. Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. 350; Branch v. Wilmington &c. R. Co., 88 N. Car. 573; Mitchell v. Carolina Cent. R. Co., 124 N. Car. 236, 32 S. E. 671, 44 L. R. A. 515; Millock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674; Merchants' &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; Benson v. Oregon &c. R. Co., 35 Utah 241, 99 Pac. 1072, 136 Am. St. 1052, 19 Ann. Cas. 803. And the burden is held to be upon the carrier to prove this. Kansas &c. R. Co. v. Ayres, 63 Ark. 331, 38 S. W. 585; Cox v. Central &c. R. Co., 170 Mass. 128, 49 N. E. 97; Hinkle v. Southern R. Co., 126 N. Car. 932, 36 S. E. 348, 78 Am. St. 685; Louisville &c. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

[30] Post, § 2260. See also Kansas City &c. Ry. Co. v. Oakley, 115 Ark. 20, 170 S. W. 565. But see where the stipulation is that it shall not be liable beyond its own line. Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

in accord as to what will constitute a sufficient special contract, and there is some conflict among them as to the extent to which the liability of the carrier may be thus limited. These, and other phases of the subject, will be considered in the following sections. It may be well to note here, however, that some radical changes are made in the Carmack and Cummins amendments, especially the second Cummins amendment, in the case of interstate shipments.

§ 2256 (1501). Nature of special contract required.—In nearly all of the states except, perhaps, Pennsylvania[31] and North Carolina[32] the rule is well-established that a common carrier can not limit or restrict its common-law liability by the mere general notice, even though knowledge thereof is brought home to the shipper.[33] Such a notice is regarded merely as a proposal for a contract and is not binding upon the shipper unless he assents

[31] Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; Pennsylvania R. Co. v. Miller, 87 Pa. St. 395. But compare Verner v. Sweitzer, 32 Pa. St. 208.

[32] Capehart v. Seaboard &c. R. Co., 81 N. Car. 438, 31 Am. Rep. 505. See also Orndorff v. Adams Ex. Co., 66 Ky. 194, 96 Am. Dec. 207; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468 (but compare Central &c. R. Co. v. City Mills Co., 128 Ga. 841, 58 S. E. 197). But compare Smith v. North Carolina R. Co., 64 N. Car. 235. The rule in North Carolina seems to be in doubt.

[33] New Jersey &c. Co. v. Merchants' Bank, 6 How (U. S.) 344, 12 L. ed. 465; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Georgia R. Co. v. Gann, 68 Ga. 350; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760 and note; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Evansville &c. R. Co. v. Young, 28 Ind. 516; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Kansas City &c. R. Co. v. Rodebaugh, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715 and note; Lewis v. New York &c. Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 131; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470, and note where many authorities are collected and reviewed; Jones v. Voorhees, 10 Ohio 145; Gaines v. Union Transp. Co., 28 Ohio St. 418; Kimball v. Rutland &c. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Brown v. Adams Ex. Co., 15 W. Va. 812. But compare to the effect that assent may be implied. Field v. Chicago &c. R. Co., 71 Ill. 458; Orndorff & Co.

to its terms.[34] Thus, it has been held that a notice given in a newspaper, or in a placard posted up in a public place or even on the back of a receipt, is insufficient of itself to bind the shipper and relieve the company from liability.[35] So, it has been held that a notice printed or stamped upon the back of a ticket or check is insufficient unless it appears that the passenger or shipper assented thereto.[36] But the acceptance of a bill of lading in which the terms of the special contract are fairly set forth may be sufficient evidence of assets thereto,[37] except in those juris-

v. Adams Exp. Co., 3 Bush (Ky.) 194, 96 Am. Dec. 207; Farmers' &c. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

[34] Buckland v. Adams Ex. Co., 97 Mass. 124, 93 Am. Dec. 68; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349 and note; Moses v. Boston &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Belger v. Dinsmore, 51 Barb. (N. Y.) 69; Dorr v. New Jersey &c. Co., 11 N. Y. 485, 62 Am. Dec. 125.

[35] Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297; Peck v. Weeks, 34 Conn. 145; Merchants' &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265, 61 Am. & Eng. R. Cas. 145; Malone v. Boston &c. R. Co., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Macklin v. New Jersey &c. Co., 7 Abb. Pr. N. S. (N. Y.) 229; Newell v. Smith, 49 Vt. 255; Brown v. Adams Ex. Co., 15 W. Va. 812; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716. See also Michigan Cent. R. Co. v. Mineral Springs &c. Co., 83 U. S. 318, 21 L. ed. 297; New York &c. R. Co. v. Sayles, 87 Fed. 444; Central &c. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170; Baltimore &c. R. Co. v. Doyle, 142 Fed. 669; Inman & Co. v. Seaboard &c. R. Co., 159 Fed. 960. But see Cresson v. Philadelphia &c. R. Co., 11 Phila. (Pa.) 597.

[36] Indianapolis &c. R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640; Kansas City &c. R. Co. v. Rodebaugh, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715 and note; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Baltimore &c. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Wilson v. Chesapeake &c. R. Co., 21 Grat. (Va.) 654. But see Steers v. Liverpool &c. Co., 57 N. Y. 1, 15 Am. Rep. 453.

[37] Montagu v. Henry B. Hyde, The, 82 Fed. 681; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49 and note; Jones v. Cincinnati &c. R. Co., 89 Ala. 376, 8 So. 61; Monton v. Louisville &c. R. Co., 128 Ala. 537, 29 So. 602; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Adams Express Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 94 Am. St. 279; Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Baltimore &c. R. Co. v. Brady, 32

dictions in which the special contract is required to be signed by the shipper. So, as stated by Greenleaf, "it is now well-settled that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given of their contents, the rates of freight and the like, as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid for accordingly."[38] These are matters which the carrier has a right to properly regulate in the conduct of its business and about which it is entitled to information in order to fix charges and determine what precautions are necessary in the carriage of the goods.[39] An express special contract is, therefore, unnecessary. But this is the only clearly defined exception, if, indeed, it can be called an exception, to the general rule that a special contract is required in order to relieve the carrier from its liability as an insurer. In some

Md. 333; Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131; McMillan v. Michigan Southern &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Merchants' &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; Boorman v. American Exp. Co., 21 Wis. 154. But see Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Chicago &c. R. Co. v. Calumet &c., 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68; Gaines v. Union Transp. &c. Co., 28 Ohio St. 418; Houston &c. R. Co. v. Smith, 44 Tex. Civ. App. 299, 97 S. W. 836.

[38] Lawrence v. New York &c. R. Co., 36 Conn. 63; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Kallman v. United States Exp. Co., 3 Kans. 205; Pacific Exp. Co. v. Foley, 46 Kans. 457, 26 Pac. 665, 26 Am. St. 107; Judson v. Western R. Co., 88 Mass. 486, 493, 83 Am. Dec. 646; McMillan v. Michigan Southern &c. R. Co., 16 Mich. 79, 110, 93 Am. Dec. 208; Snider v. Adams Exp. Co., 63 Mo. 376; Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. 610; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Rathbone v. New York, Cent. &c. R. Co., 140 N. Y. 48, 35 N. E. 418; Farmers' &c. Bank v. Champlain &c. Co., 23 Vt. 186, 206, 56 Am. Dec. 68.

[39] Oppenheimer v. United States Ex. Co., 69 Ill. 62, 18 Am. Rep. 596. See also Gerry v. American Exp. Co., 100 Maine 519, 62 Atl. 498.

jurisdictions the contract is required by statute to be in writing and signed by the shipper or owner of the goods.[40]

§ 2257 (1502). Limitation in receipt or bill of lading.—The common-law liability of a common carrier as an insurer may be and usually is, limited by a special contract embodied in the receipt or bill of lading.[41] When the special contract is express and supported by a sufficient consideration it matters not, in most jurisdictions, in what manner or form it is made.[42] The minds of the parties must, however, meet in order to form the

[40] See Hartwell v. Northern Pac. R. Co., 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342; Kirby v. Western Union Tel. Co., 4 S. Dak. 105, 439, 55 N. W. 759, 30 L. R. A. 612; Burroughs v. Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875; Ohio &c. R. Co. v. Hamlin, 42 Ill. App. 441; Central R. &c. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Frasier v. Charleston &c. R. Co., 73 S. Car. 140, 52 S. E. 964 (holding that the law of Georgia to this effect could be shown where the carrier had set up a special contract in defense, although the plaintiff had not pleaded such law); Central &c. R. Co. v. Kavanaugh, 92 Fed. 56.

[41] See authorities cited in the next three notes. See also Limiting Liability of Express Companies, 20 Cent. L. J. 108; and notes in 88 Am. St. 74, et seq., and in 63 L. R. A. 525, et seq.; Lynch v. Southern Exp. Co., 18 Ga. App. 761, 90 S. E. 655.

[42] In Missouri &c. R. Co. v. Patrick, 144 Fed. 632, it was held that neither a bill of lading nor any other writing is necessary; that a contract by which the liability of the carrier for loss is limited to an agreed value per hundred pounds, in consideration of a reduced rate, is valid, and that where a shipper accepts and acts on a paper given to his agent as a bill of lading, containing a provision limiting the carrier's liability in case of loss, he can not deny that such was the contract, on the ground that his agent was unable to read it. In this case the plaintiff, through an agent, had delivered goods to the defendant for shipment, and asked for a bill of lading, which was given, but the station agent neglected to sign it. The goods having been lost, the plaintiff brought suit for their value, setting up the writing as the contract of shipment, and the court held that the paper, while not constituting a written contract, was evidence of the contract actually made, and, in the absence of any evidencee to the contrary, established the terms of such contract. Compare, however, Cleveland &c. R. Co. v. Potts & Co., 33 Ind. App. 564, 71 N. E. 685; and the opinion of the state court in Patrick v. Missouri &c. R. Co., 51 Ind. Ter. 742, 88 S. W. 330 (also citing text).

contract, as in other cases, that is, the terms proposed by the carrier must be accepted or assented to by the shipper. It is generally held, and correctly as we think, that the acceptance of the receipt or bill of lading in which the terms are clearly stated, without objection, is sufficient to make a special contract within the meaning of the law, which will be binding upon the parties according to its terms, provided it is fairly and freely made and is reasonable and not opposed to public policy.[43] Some of the authorities hold that the acceptance of such a receipt or bill of lading, without objection, is prima facie evidence of assent to the proposed contract,[44] but the better rule, and that supported by the weight of authority is that, in the absence of fraud, imposi-

[43] Calderon v. Atlas Steamship Co., 64 Fed. 874 (shipper bound by conditions referred to in body of bill of lading and endorsed on back); Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49 and note; Jones v. Cincinnati &c. R. Co., 89 Ala. 376, 8 So. 61; Michalitschke v. Wells, Fargo & Co., 118 Cal. 683, 50 Pac. 847; Overland Mail &c. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514; Missouri Pac. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496; Louisville &c. R. Co. v. Brownlee, 14 Bush. (Ky.) 590; McMillan v. Michigan Southern R. Co., 16 Mich. 79, 93 Am. Dec. 208; Snider v. Adams Exp. Co., 63 Mo. 376; Merrill v. American Exp. Co., 62 N. H. 514; Hill v. Syracuse &c. R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Cincinnati &c. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Piedmont &c. Co. v. Columbia &c. R. Co., 19 S. Car. 353; Bethea v. Northeastern R. Co., 26 S. Car. 91, 1 S. E. 372; Merchants' &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313, 61 Am. & Eng. R. Cas. 197; Boorman v. American Exp. Co., 21 Wis. 154. See also Acton v. Castle Mail Packet Co., 73 Law J. (1895) 158. Contra, Adams Exp. Co. v. Haynes, 42 Ill. 89; Erie &c. R. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Adams Exp. Co. v. Stettauers, 61 Ill. 184, 14 Am. Rep. 57; Merchants' &c. Co. v. Leysor, 89 Ill. 43; Southern Exp. Co. v. Moon, 39 Miss. 822; Mobile &c. R. Co. v. Weiner, 49 Miss. 725; Levering v. Union Trans. &c. Co., 42 Mo. 88, 97 Am. Dec. 320. See note in 88 Am. St. 77, et seq., and ante. § 2256; and authorities cited in Louisville &c. R. Co. v. Nicholai, 4 Ind App. 119, 30 N. E. 424, 51 Am. St. 206, showing when limitations are binding and when they are not because upon the back, or because of imposition, deception, or the like.

[44] Southern Exp. Co. v. Barnes, 36 Ga. 532; Georgia &c. R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; Adams Exp. Co. v. Nock, 63 Ky. 562, 87 Am. Dec. 510; Baltimore

tion, or the like, it is conclusive.[45] It is not meant by this rule, however, that assent will be conclusively presumed under all circumstances. If a shipper, without negligence on his part, is misled by the fraud or artifice of the carrier, or the like, so that the minds of the parties cannot be presumed to have met, the mere acceptance of the receipt or bill of lading may not be sufficient to bind the shipper to all its terms.[46] So, where the carrier

&c. R. Co. v. Brady, 32 Md. 333; Christenson v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Hill v. Adams Exp. Co., 80 N. J. L. 604, 77 Atl. 1073; King v. Woolbridge, 34 Vt. 565; Strohn v. Detroit &c. R. Co., 21 Wis. 554, 94 Am. Dec. 564; Morrison v. Phillips &c. Co., 44 Wis. 405, 28 Am. Rep. 599.

[45] Louisville &c. R. Co. v. Meyer, 78 Ala. 597; Jones v. Cincinnati &c. R. Co., 89 Ala. 376, 8 So. 61; Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Railroad Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594, 22 L. ed. 724; Wertheimer v. Pennsylvania R. Co., 1 Fed. 232, 17 Blatch. (U. S.) 421; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. Rep. 104; Lawrence v. New York &c. R. Co., 36 Conn. 63; Robinson v. Merchants' &c. Co., 45 Iowa 470; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Germania &c. Ins. Co. v. Memphis &c. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Zimmer v. New York Central &c. R. Co., 137 N. Y. 460, 33 N. E. 642; Johnstone v. Richmond &c. R. Co., 39 S. Car. 55, 17 S. E. 512. In the first four cases above cited, it is held that the fact that the shipper did not read it makes no difference. See also to the same effect, Fibel v. Livingston, 64 Barb. (N. Y.) 179 (shipper unable to read); Carr v. Texas &c. R. Co., 113 Fed. 91; Missouri &c. R. Co. v. Patrick, 144 Fed. 632 (agent of shipper unable to read); Stewart v. Cleveland &c. R. Co., 21 Ind. App. 218, 52 N. E. 89; Pittsburgh &c. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Mulligan v. Illinois &c. R. Co., 36 Iowa 181, 14 Am. Rep. 514; McMillan v. Michigan So. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Houston &c. R. Co. v. Smith, 44 Tex. Civ. App. 299, 97 S. W. 836; Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852. See also Charnock v. Texas &c. R. Co., 113 Fed. 92, affirmed in 194 U. S. 432, 24 Sup. Ct. 67, 48 L. ed. 1057; Hengstler v. Flint &c. R. Co., 125 Mich. 530, 84 N. W. 1067; Kellerman v. Kansas City &c. R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; McGovern v. Ann Arbor R. Co., 165 Wis. 525, 162 N. W. 668.

[46] Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148. See Perry v. Thompson, 98 Mass. 249;

accepts the goods unconditionally, unless there is some valid and controlling custom to the contrary or other circumstances peculiar to the particular case, the acceptance by the shipper of a receipt or bill of lading containing the proposed special contract, after the goods are shipped, will not necessarily relieve the carrier from liability.[47]

§ 2258 (1502a). Effect of failure of shipper to read contract containing limitation.—The rule seems well-settled in most jurisdictions that a shipper cannot, in the absence of fraud by the

Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153; Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Verner v. Sweitzer, 32 Pa. St. 208; Butler v. Heane, 2 Camp. 415. See also Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948. Compare also Baltimore &c. R. Co. v. Doyle, 142 Fed. 669; Pittsburgh &c. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Lacey v. Oregon &c. R. Co., 63 Ore. 596, 128 Pac. 999; Allen &c. Co. v. Canadian Pac. R. Co., 42 Wash. 62, 84 Pac. 620.

[47] Wheeler v. New Brunswick &c. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. ed. 341; Merchants' Dispatch Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Central &c. R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Michigan Cent. R. Co. v. Boyd, 91 Ill. 268; Merchants' &c. Co. v. Furthman, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265, 9 Am. Rep. & Corp. 19; Snow v. Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702; Wilde v. Merchants' Dispatch Co., 47 Iowa 247, 29 Am. Rep. 479; Gott v. Dinsmore, 111 Mass. 45; Southard v. Minneapolis &c. R. Co., 60 Minn. 382, 62 N. W. 442, 619, 61 Am. & Eng. R. Cas. 282; Union Pac. R. Co. v. Marston, 30 Nebr. 241, 46 N. W. 485; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712; Swift v. Pacific &c. Co., 106 N. Y. 206, 12 N. E. 583; Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Gaines v. Transportation Co., 28 Ohio St. 418; Strohn v. Detroit &c. R. Co., 21 Wis. 554, 94 Am. Dec. 564. See also San Antonio &c. Ry. Co. v. Bracht (Tex. Civ. App.), 172 S. W. 1116. But see as to the effect of a custom to send bill of lading after receipt of goods. Shelton v. Merchants' &c. Co., 59 N. Y. 258. There must be something more than proof of the bill of lading without dissent, in such cases. Gage v. Tirrell, 91 Mass. 299; Illinois Cent. R. Co. v. Craig, 102 Tenn. 298, 52 S. W. 164; Missouri Pac. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496; Doan v. St. Louis &c. Co., 38 Mo. App. 408; Missouri &c. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Arctic Bird, The, 109 Fed. 167. See also Southern Pac. R. Co. v. Meadors & Co., 104 Tex. 469, 140 S. W. 427.

carrier, avoid limitations, of the carrier's liability contained in the bill of lading or shipping contract by showing that he executed the contract hurriedly, or without due care, or that he was ignorant of its contents, or failed to read the same.[48] As has been said by one court: "It would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentations, or mistakes, it must be presumed that he read the contract, and assented to its provisions."[49] It is not required that the carrier or his agent should read the bill of lading to the shipper,[50] or call his attention to the conditions contained therein.[51]

§ 2259 (1503). Parol limitation.—A special contract limiting the liability of the carrier as an insurer may be verbal as well as written, unless the statute requires it to be in writing. It may be more difficult to establish a specific parol contract, but, when

[48] Wabash &c. R. Co. v. Black, 11 Ill. App. 465; Stewart v. Cleveland &c. R. Co., 21 Ind. App. 218, 52 N. E. 89; Henstler v. Flint &c. R. Co., 125 Mich. 530, 84 N. W. 1067, 7 Det. Leg. N. 607; Patterson v. Kansas City &c. R. Co., 56 Mo. App. 657; Mills v. Weir, 82 App. Div. 396, 81 N. Y. S. 801; Hoffman v. Metropolitan Express Co., 111 App. Div. 407, 97 N. Y. S. 838; Johnstone v. Richmond &c. R. Co., 39 S. Car. 55, 17 S. E. 512; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. See also Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915; McMillan v. Michigan &c. R., 16 Mich. 79, 93 Am. Dec. 208; Snider v. Adams Express Co., 63 Mo. 376; Houston &c. R. Co. v. Smith, 44 Tex. Civ. App. 299, 97 S. W. 836. But compare Gulf &c. Ry. Co. v. Vasbinder (Tex. Civ. App.), 172 S. W. 763.

[49] Nashville &c. R. Co. v. Stone & Haslett, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. See also Bethea v. Northwestern R. Co., 26 S. Car. 96, 1 S. E. 376; Hill v. Syracuse &c. R. Co., 73 N. Y. 351, 29 Am. Rep. 163 and note; Coles v. Louisville &c. R. Co., 41 Ill. App. 607; St. Louis &c. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760.

[50] Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148; New York &c. R. Co. v. Seiberling Co., 8 O. C. C. 593, 1 O. Dec. 63.

[51] Snider v. Adams Exp. Co., 63 Mo. 376; Richmond &c. R. Co. v. Richardson, 23 Ky. L. 2234, 66 S. W. 1035. But see Baltimore &c. R. Co. v. Doyle, 142 Fed. 669; Carpen-

once clearly established, it is as obligatory as a written one.[52] Of course, where there is a complete written contract, it can not, as a rule, be contradicted or varied by oral evidence, and all verbal agreements made prior to the execution of the bill of lading are usually merged therein,[53] but, as we have seen,[54] there are cases in which, after the carrier has once accepted and shipped the goods under an unconditional parol contract, it can not afterwards limit its liability by a receipt or bill of lading, at least without assent or subsequent contract[55] and so, on the other hand, after a receipt or bill of lading has been executed, a new contract may doubtless be made, in parol, upon a new consideration, whereby the liability of the carrier may be properly

ter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252 (must be explained to shipper if not so expressed as to be intelligible to person of ordinary intelligence).

[52] Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; American Transp. Co. v. Moore, 5 Mich. 368. See also Mobile &c. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527; Missouri &c. R. Co. v. Patrick, 144 Fed. 632, 633 (citing text); Gulf &c. Ry. Co. v. Vasbinder (Tex. Civ. App.), 172 S. W. 763; 4 Elliott Cont. § 3209. But see under statute, Farnsworth v. National Exp. Co., 166 Mich. 676, 132 N. W. 441.

[53] Ante, §§ 2135, 2143.

[54] Ante, §§ 1502, 2257, note 47. See particularly Merchants' Dispatch &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265, 61 Am. & Eng. R. Cas. 145; Wheeler v. New Brunswick &c. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. ed. 341; Missouri Pac. R. Co. v. Beeson, 30 Kans. 298, 2 Pac. 496; Union Pac. R. Co. v. Marston, 30 Nebr. 241, 46 N. W. 485; Bostwick v. Baltimore &c. R. Co., 45 N. Y. 712; Hamilton v. Western &c. R. Co., 96 N. Car. 398, 3 S. E. 164; San Antonio &c. R. Co. v. Bracht (Tex. Civ. App.), 172 S. W. 1116.

[55] See Stoner v. Chicago &c. R. Co., 109 Iowa 551, 80 N. W. 569; Rudell v. Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; Farmers' &c. Trust Co. v. Northern Pac. Co., 120 Fed. 873. It is held in several Missouri cases that a verbal contract on which a cause of action has accrued does not merge in a subsequent contract not providing for release of damages. Gann v. Chicago &c. R. Co., 72 Mo. App. 34; Harrison v. Missouri &c. R. Co., 74 Mo. 364, 41 Am. Rep. 318. But it is also held that, although the agreement of the local agent of a carrier with a shipper, who applies for cars in which to make a shipment, to furnish him cars on a certain day, constitutes a contract, liability on which a cause of action for damages for delay in shipment accrues on the failure to furnish them at

limited or other changes made in the terms of the original contract.[56]

§ 2260 (1504). **Consideration necessary.**—It is frequently stated in general terms that a common carrier may, by contract, limit its common-law liability as an insurer. But, as we have already said, the contract must be reasonable and must have some consideration to support it.[57] The carrier has no right to force such a contract upon the shipper, and the latter must

such time, the cause of action may be released by a subsequent contract for the shipment, which for a consideration provides for such release. Fountain v. Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393. And the rule has been stated as follows: "If damages have accrued under a verbal contract, and there is no waiver or disclaimer of such breach in the subsequent writing, an action may be maintained on the verbal agreement, notwithstanding there was a subsequent writing. But if the subsequent agreement contains among its stipulations that any breach of the verbal contract relating to the shipments is waived, thereby evincing an intention on the part of the contracting parties to regard the writing as covering the whole shipment, and determining their rights arising by reason of such shipment, no action can be maintained on the verbal agreement." Hoover v. St. Louis &c. R. Co., 113 Mo. App. 688, 88 S. W. 769.

[56] See Delaware, The, 14 Wall. (U. C.) 579, 20 L. ed. 779; Baltimore &c. R. Co. v. Brown, 54 Pa. St. 77; Toledo &c. R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Cincinnati &c. R. Co. v. Steele, 140 Ky. 383, 131 S. W. 22, 140 Am. St. 389; Steidl v. Minneapolis &c. R. Co., 94 Minn. 233, 102 N. W. 701. We mean that such a contract would be valid as between the parties. We are not here considering the rights of a bona fide purchaser of the bill of lading. See also as to evidence of previous dealings being admissible in some instances to show assent. Lake Shore &c. R. Co. v. Davis, 16 Ill. 425. And compare Erie &c. Transp. Co. v. Deter, 91 Ill. 195, 33 Am. Rep. 51; Leitch v. Union &c. Co., Fed. Cas. No. 8,224; Wilde v. Merchants' &c. Transp. Co., 47 Iowa 272; Hartman v. Louisville &c. R. Co., 39 Mo. App. 88; Cincinnati &c. R. Co. v. Berdan & Co., 22 Ohio C. C. 326; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. 881.

[57] Inman v. Seaboard &c. R. Co., 159 Fed. 960 (citing text but holding consideration sufficient); Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Santa Fe &c. R. Co. v. Grant Bros. Const. Co., 13 Ariz. 186, 108 Pac. 467; St. Louis &c. R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21; Southern Exp. Co. v. Hill, 81 Ark. 1, 98 S. W. 371; Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; McIntosh v. Oregon R. &c.

usually have the option of having his goods carried without any such restriction upon the liability of the carrier at a higher rate of freight proportionate to the risk.[58] If he is given such an opinion, however, a decrease in the rate as an inducement for the special contract reasonably limiting the common-law liability of the carrier will be a sufficient consideration to support such contract.[59] But the mere receipt of the goods and undertaking

Co., 17 Idaho 100, 105 Pac. 66; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214; Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Kansas Pac. R. Co. v. Reynolds, 17 Kans. 251; Baughman v. Louisville &c. R. Co., 94 Ky. 150, 21 S. W. 757; Wehmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546, 61 Am. & Eng. R. Cas. 273; Kellerman v. Kansas City &c. R. Co. (Mo.), 34 S. W. 41; Burns v. Chicago &c. R. Co., 151 Mo. App. 573, 132 S. W. 1; Conover v. Pacific Exp. Co., 50 Mo. App. 31; McElvain v. St. Louis &c. R. Co., 151 Mo. App. 126, 131 S. W. 736, 743 (citing text); Louisville &c. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Louisville &c. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162, 16 Am. St. 315; Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473; Olwell v. Adams Exp. Co., 1 Cent. L. J. 186.

[58] York Co. v. Central R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Little Rock &c. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. 230; Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148; Judson v. Western R. Co., 6 Allen (Mass.) 486, 83 Am. Dec. 646; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776. See also Colorado &c. R. Co. v. Manatt, 21 Colo. App. 593, 121 Pac. 1012; Lacey v. Oregon R. &c. Co., 62 Ore. 596, 128 Pac. 999 (both holding that shipper must receive the benefit of the reduced rate). But see as to exemption of carrier from liability for loss by fire. Arthur v. Texas &c. R. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. ed. 590; Cau v. Texas &c. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. ed. 1053; with which compare, however, Taylor & Co. v. Little Rock &c. R. Co., 39 Ark. 148; Scott County Milling Co. v. St. Louis &c. R. Co., 127 Mo. App. 80, 104 S. W. 924.

[59] St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; St. Louis &c. R. Co. v. Furlow, 89 Ark. 404, 117 S. W. 517; Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Hill v. Boston &c. R. Co., 144 Mass. 284, 10 N. E. 836; Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am.

to carry, in the absence of any such option or reduced rate, is not a sufficient consideration, and no reduction in the rate will be presumed where it is forbidden by statute.[60] So, as we have seen, no such presumption arises where the carrier has agreed to transport the goods without any stipulation limiting its liability, and, after they have been shipped, executes a bill of lading containing a clause limiting its liability.[61] But it seems that such a consideration will usually be presumed in the absence of anything to the contrary,[62] and the carrier is not obliged to specifi-

St. 614; Nelson v. Hudson River &c. R. Co., 48 N. Y. 498; Barnes v. Long Island R. Co., 100 N. Y. S. 593, 64 Cent. Law Jour. 2; Missouri &c. R. Co. v. McLaughlin, 29 Okla. 345, 116 Pac. 811; Farnham v. Camden &c. R. Co., 55 Pa. St. 53; Johnstone v. Richmond &c. R. Co., 39 S. Car. 55, 17 S. E. 512; Louisville &c. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Mobile &c. R. Co. v. Brownsville &c. Live Stock Co., 123 Tenn. 298, 130 S. W. 788; Richmond &c. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; Brown v. Manchester &c. R. Co., L. R. 10 Q. B. Div. 250; Manchester &c. R. Co. v. Brown, L. R. 8 App. Cas. 703. Most of the cases cited in § 2255, ante, are to the same effect.

[60] Wehmann v. Minneapolis &c. R. Co., 58 Minn. 22, 59 N. W. 546, 61 Am. & Eng. R. Cas. 273. See also Seybolt v. New York &c. R. Co., 95 N. Y. 562, 575, 47 Am. Rep. 75, and note; McIntosh v. Oregon R. &c. Co., 17 Idaho 100, 105 Pac. 66; Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

[61] Ante, § 2257, note 47, and post § 2291 and notes. See also St. Louis &c. R. Co. v. Warren (Tex. Civ. App.), 80 S. W. 537; Gulf &c. R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; Atchison &c. R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699.

[62] York &c. Co. v. Cent. R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; Louisville &c. R. Co. v. Oden, 80 Ala. 38; St. Louis &c. R. Co. v. Lesser, 46 Ark. 236; St. Louis &c. R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; Sprague v. Missouri Pac. R. Co., 34 Kans. 347, 8 Pac. 465; McMillan v. Michigan Southern R. Co., 16 Mich. 79, 93 Am. Dec. 208. See also Cau v. Texas &c. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. ed. 1053; Schaller v. Chicago &c. R. Co., 97 Wis. 31, 71 N. W. 1042; Courteen v. Kanawha Dispatch Co., 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182. But see McIntosh v. Oregon &c. R. Co., 17 Idaho 100, 105 Pac. 1076; Baltimore &c. R. Co. v. Brady, 32 Md. 333; Ficklin v. Wabash R. Co., 117 Mo. App. 221, 93 S. W. 847; Ward v. Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28.

cally tender to the shipper a contract omitting the limited liability clause unless the latter requests it.[63]

§ 2261 (1504a). **Effect of agreement for rebate in violation of law on liability for negligence.**—A carrier cannot escape liability for negligence in the transportation of goods on the ground that the freight was shipped under a contract for a special rate and rebate in violation of the interstate commerce law. The stipulation as to the rebate, though void, does not invalidate the contract of affreightment. In the case announcing this doctrine the court says: "The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void; and we think there is nothing in the law, or the policy of it, which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void, and of course agreed freight rates in violation of law could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different constructions has yet been put upon the interstate commerce law, so far as we are advised, and we decline to give it any other."[64]

§ 2262 (1505). **Construction of contract.**—Contracts limiting

[63] Louisville &c. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837. See also Cau v. Texas &c. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. ed. 1053; Arthur v. Texas &c. Co., 139 Fed. 127; Inman v. Seaboard &c. R. Co., 159 Fed. 960, 968 (citing text); Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; St. Louis &c. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. 75, 12 Ann. Cas. 125.

[64] Insurance Co. of North America v. Delaware Mutual Safety Ins. Co., 91 Tenn. 755, 19 S. W. 755. See also Warren v. Cleveland &c. R. Co., 156 Ill. App. 111; Judge v. Northern Pac. R. Co., 189 Fed. 1014; Merchants Cotton Press &c. Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; Ward v. Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28, 81 Am. St. 302.

or restricting the common-law liability of a common carrier are to be construed strictly against the carrier.[65] Thus, where the liability of the carrier is limited only as to articles of certain specified classes, articles not falling clearly within one of those classes will not be included.[66] So, where words specifying the particular risks as to which the liability of the carrier is to be limited are followed by general words of exemption the latter should usually be construed to embrace only dangers or risks of the same general class or kind as those previously specified.[67]

[65] Queen of the Pacific, The, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. ed. 419 (but exemption is not to be frittered away by adherence to the letter in violation of the intent and spirit); N. K. Fairbanks &c. Co. v. Cincinnati &c. R. Co., 81 Fed. 289, 38 L. R. A. 271; Montgomery &c. R. Co. v. Edmonds, 41 Ala. 667; Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Louisville &c. R. Co. v. Touart, 97 Ala. 514, 11 So. 756; Little Rock &c. R. Co. v. Talbot, 39 Ark. 523; Hooper v. Wells &c. Co., 27 Cal. 11, 85 Am. Dec. 211 and note; Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Estes v. Denver &c. R. Co., 49 Colo. 378, 113 Pac. 1005; St. Louis &c. R. Co. v. Smuck, 49 Ind. 302; Kansas City &c. R. Co. v. Holland, 68 Miss. 351, 8 So. 516; Illinois Cent. R. Co. v. Lancashire Co., 79 Miss. 114, 30 So. 43; Stanard &c. Co. v. White Line &c. Co., 122 Mo. 258, 26 S. W. 704, 61 Am. & Eng. R. Cas. 185; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433, 435, 436; Nicholas v. New York &c. R. Co., 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; Hoye v. Pennsylvania R. Co., 191 N. Y. 101, 83 N. E. 586, 17 L. R. A. (N. S.) 641n, 14 Ann. Cas. 414; Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. Car. 280, 38 S. E. 894, 83 Am. St. 675; Chicago &c. R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Amory Mfg. Co. v. Gulf &c. R. Co., 89 Tex. 419, 35 S. W. 856, 59 Am. St. 65; Black v. Goodrich Transportation Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Mitchell v. Lancashire &c. R. Co., L. R. 10 Q. B. 256; Robinson v. Great Western R. Co., 35 L. J. Com. P. 123 ("owner's risk" does not include delay). In Lewis v. Great Western &c. R. Co., L. R. 3 Q. B. Div. 195, it is said that the construction of such a contract is for the court and that it should take into consideration all of the circumstances, including the course of dealing between the parties. See also Coles v. Louisville &c. R. Co., 41 Ill. App. 607.

[66] Cream City R. Co. v. Chicago &c. R. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267.

[67] Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179;

Although special perils are unconditionally excepted, such as loss by fire, for instance, the exception should be so construed as not to cover losses caused by the negligence of the carrier or its servants, even in those jurisdictions in which the carrier may contract against liability for negligence, unless it very clearly appears that it was the intention of the parties to include in the exemption losses by reason of such negligence.[68] In one case it was held that a stipulation releasing the carrier from "any and all damage that may occur to said goods arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains or of cars being thrown from the track," did not relieve the company where the property was

Menzell v. Railway Co., 1 Dillon (U. S. C. C.) 531. See also Texas &c. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. ed. 362. So, it is a general rule, often applied in other cases, that general words followed by or used in connection with more specific words are restricted by the latter so far, at least, as to make the general words apply only to things ejusdem generis. Driscoll v. Fiske, 21 Pick. (Mass.) 503; Mims v. Armstrong, 31 Md. 87, 1 Am. Rep. 22; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364 and note; Edsall v. Camden &c. Co., 50 N. Y. 661; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

[68] Guildhall, The, 58 Fed. 796; Insurance Co. v. Lake Erie &c. R. Co., 152 Ind. 333, 53 N. E. 382; New Orleans &c. Ins. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302; Simon v. Steamship Fung Shuey, 21 La. Ann. 363; Ball v. Wabash &c. R. Co., 83 Mo. 574; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; Hahn v. St. Louis &c. R. Co., 141 Mo. App. 453, 125 S. W. 1185; Elliott v. New York &c. R. Co., 33 N. Y. St. 861, 11 N. Y. S. 691; Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Spinetti v. Atlas &c. Co., 80 N. Y. 71, 75, 36 Am. Rep. 579; Holsapple v. Rome &c. R. Co., 86 N. Y. 275; Kenney v. New York &c. R. Co., 125 N. Y. 422, 26 N. E. 626; Phoenix &c. Works v. Pittsburg &c. R. Co., 139 Pa. St. 284, 20 Atl. 1058; Missouri Pac. R. Co. v. Sherwood, 84 Texas 125, 19 S. W. 455, 17 L. R. A. 643 and note; Rooth v. Northeastern R. Co., L. R. 2 Ex. 173; Lewis v. Great Western R. Co., L. R. 3 Q. B. Div. 195. But compare Central R. &c. Co. v. Burton, 165 Ala. 425, 51 So. 643. So, where the contract provides in general terms that the goods are to be carried at the owner's risk, Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Canfield v. Baltimore &c. R. Co., 93 N. Y. 532, 45 Am. Rep. 268; Mobile &c. R. Co. v. Jarboe, 41 Ala. 644; D'Arc v. London &c. R. Co., L. R. 9 C. P. 325.

wholly consumed by fire, as the word "damage" did not cover a total loss.[69] In another case it was held that a limitation of liability to a certain amount on each package of goods did not apply to bales of cotton, for the reason that they were not packages within the meaning of the stipulation.[70] So where goods were shipped and carried partly by rail and partly by water a provision exempting the carrier from liability for "damages by fire or collision on the rivers or sea" did not cover loss by fire on land.[71]

§ 2263 (1505a). **Further of construction of contracts.**—Conformably to the well-known rule of construction, a stipulation for exemption from liability in part in contravention of law, and hence void, does not invalidate the entire contract if the other portions are valid and enforcible.[72] Though the words "in transit" and "in transitu" have literally the same meaning, yet the latter term when used in contracts of shipment is given a broader meaning than the former. In these contracts the words "in transit" are used to designate actual transportation from point to point; the words "in transitu" are used to denote the whole period of time from the time the goods are delivered to the carrier until they are turned over to the consignee. Thus defined the term "in transit" does not apply to goods in the possession of the carrier after the issuance of the bill of lading, but before actual transportation has commenced.[73] The well-known rule that a material alteration in any commercial paper without the consent of the party sought to be charged extinguishes his liability,[74] is not superseded and set aside by a condition in the bill of lading that "any alteration, addition or erasure in the bill of lading, which shall be made without the

[69] Menzell v. Railway Co., 1 Dillon (U. S. C. C.) 531. Compare Hiel v. St. Louis &c. R. Co., 16 Mo. App. 363.

[70] Southern Ex. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140. See also Rosenstein v. Missouri Pac. R. Co., 16 Mo. App. 225.

[71] Little Rock &c. R. Co. v. Talbot, 39 Ark. 523. See also Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Rio Grande R. Co. v. Cross, 5 Tex. Civ. App. 454, 23 S. W. 529.

[72] Prussia, The, 88 Fed. 531. See also ante § 2261.

[73] Amory Mfg. Co. v. Gulf &c. R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. 65.

[74] Wood v. Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725.

special notation hereon of the agent of the carrier issuing the bill, shall be void." This clause is construed to cover only such alterations as might be properly susceptible of special notation by the carrier's agent, and not to apply to fraudulent alterations made after the issuance of the bill of lading. As said by the court: "It would be most unreasonable to hold that the intent of the condition was to do away with the well-settled law, that a material alteration, fraudulently made by the holder, vitiates the instrument, and so leaves it unprotected from the devices of the unscrupulous."[75]

§ 2264 (1506). Conflict of laws.—It has been held that the contract exempting the carrier must be proved, as a matter of evidence, according to the law of the forum,[76] but the general rule is that the law of the place where it is made and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation.[77] So, it has been held that, although

[75] Merchants' Nat. Bk. v. Baltimore &c. Co., 102 Md. 573, 63 Atl. 108.

[76] Guildhall, The, 58 Fed. 796; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106. And, in a recent case in Kentucky, the same rule was applied to a limitation as to the time within which an action must be brought. Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412. See also Chicago &c. R. Co. v. Thompson, 41 Tex. Civ. App. 459, 93 S. W. 702; Armstrong v. Galveston &c. Co., 92 Tex. 117, 46 S. W. 33; Burgess v. Western Un. Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. 833. And so as to pleading, practice and statute of limitations. Atlanta &c. R. Co. v. Broome, 3 Ga. App. 641, 60 S. E. 355; Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; St. Louis &c. Ry. Co. v. Bryce, 49 Tex. Civ. App. 608, 110 S. W. 529.

[77] Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788; Henry B. Hyde, The, 82 Fed. 681; Smith v. Atchison, 194 Fed. 79; Western &c. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Pennsylvania Co. v. Fairchild, 69 Ill. 260; Michigan Cent. R. Co. v. Boyd, 91 Ill. 268; Merchants' Dispatch &c. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. Dec. 265, 61 Am. & Eng. R. Cas. 145; McDaniel v. Chicago &c. R. Co., 24 Iowa 412; Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550, 61 Am. & Eng. R. Cas. 329; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. 107; Dyke v. Erie &c. R. Co., 45 N. Y. 113, 6 Am. Rep.

a statute of the state in which the carrier is chartered prohibits common carriers from limiting their common-law liability by any stipulation in a receipt, the statute will not prevent such a limitation in a contract made in another state for transportation to a third state.[78] But where the law of the place in which the contract was made is not pleaded or shown it will be presumed that it is the same as that of the state in which the action is brought,[79] at least where the common law prevails in the latter state. And it seems that there may be exceptions to the general rule, founded upon the supposed intention of the parties gathered from circumstances surrounding the transaction.[80] Thus, where

43; Fish v. Delaware &c. R. Co., 211 N. Y. 374, 105 N. E. 661, 663, Ann. Cas. 1915C, 763n (citing text); Forepaugh v. Delaware &c. R. Co., 128 Pa. St. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. 672; Fairchild v. Philadelphia &c. R. Co., 148 Pa. St. 527, 24 Atl. 79; Missouri &c. Co., In re, L. R. 42 Ch. Div. 321; Peninsular &c. Co. v. Shand, 3 Moore P. C. (N. S.) 272. But see Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1 and note. See ante § 2243; and notes in 63 L. R. A. 525 et seq. and 88 Am. St. 125 et seq.; also Caldwell v. Seaboard &c. R., 73 S. Car. 443, 53 S. E. 746, 754 (citing text). In Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 So. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. 24, it is held that a contract to transport goods to another state and there deliver them is to be performed in the latter and is subject to its laws as to the validity of a provision governing the carrier's liability.

[78] Thomas v. Wabash &c. R. Co., 63 Fed. 200. See also Tecumseh Mills v. Louisville &c. R. Co., 108 Ky. 572, 57 S. W. 9, 49 L. R. A. 557; St. Joseph &c. R. Co. v. Palmer, 38 Nebr. 463, 56 N. W. 957, 22 L. R. A. 335; Atchison &c. R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98.

[79] Palmer v. Atchison &c. R. Co., 101 Cal. 187, 35 Pac. 630. In some states, however, the presumption would be that the common law prevailed in the state in which the contract was made. See generally Mexican Nat. R. Co. v. Jackson, 118 Fed. 549; Mener v. Chicago &c. R. Co. 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 817, 49 Am. St. 898, 11 S. Dak. 94, 75 N. W. 823, 74 Am. St. 774; Davis v. Chicago &c. R. Co., 83 Iowa 744, 49 N. W. 77. But a foreign statute forbidding a limitation of the carrier's liability was held available without being pleaded, in Coats v. Chicago &c. R. Co., 134 Ill. App. 217, and in International &c. R. Co. v. Moody, 71 Tex. 614, 9 S. W. 465, it was held that the contract being in violation of the Texas law would not be assumed to be valid under the foreign law in the absence of averment and proof.

[80] Burnett v. Pennsylvania R. Co., 76 Pa. 45, 34 Atl. 972. See ante, § 2243, also Hughes v. Penn-

the contract is made in one state to be wholly performed in another it may be presumed that the parties entered into it with reference to the law of the place of performance and it has been held that the law of that place will govern as to its validity and effect.[81] So, it is a general rule that a contract will not be enforced where it is contrary to the policy and institutions of the state in which it is sought to be enforced, and this rule has sometimes been applied where a contract exempting a carrier from liability for negligence, although valid, where made, is contrary to the policy of the country in which the action was brought.[82] But, in other cases, such limitations have been enforced, when valid where made, notwithstanding they would not have been valid if made in the state of the forum.[83]

§ 2265 (1507). **Power of agents to agree to limitation.**—We have elsewhere considered the power of the carrier's agents to

sylvania R. Co., 202 Pa. St. 222, 51 Atl. 990, 63 L. R. A. 513 and note, 90 Am. St. 713.

[81] Ryan v. Missouri R. Co., 65 Tex. 13, 57 Am. Rep. 589.

[82] Lallande v. His Creditors, 42 La. Ann. 705, 7 So. 895; Guildhall, The, 58 Fed. 796. See also Brantford City, The, 29 Fed. 373; Monroe v. Iowa, The, 50 Fed. 561; Lake Shore &c. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425n; Chicago &c. R. Co. v. Gardiner, 51 Nebr. 70, 70 N. W. 508; Hughes v. Pennsylvania R. Co., 202 Pa. St. 222, 51 Atl. 990, 63 L. R. A. 513, 90 Am. St. 713; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 369; International &c. R. Co. v. Vandeventer, 48 Tex. Civ. App. 366, 107 S. W. 560; St. Louis &c. R. Co. v. McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346; Adams Exp. Co. v. Green, 112 Va. 527, 72 S. E. 102. In some of these cases the loss occurred in the state of the forum and that was regarded as a reason for not enforcing the contract contrary to the policy of the forum, even though it might, perhaps, have otherwise been enforced there.

[83] Hazel v. Chicago &c. R. Co., 82 Iowa 477, 48 N. W. 926; O'Regan v. Cunard &c. Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. 484; Tecumseh Mills v. Louisville &c. R. Co., 108 Ky. 572, 57 S. W. 9, 49 L. R. A. 557; Cleveland &c. R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. (N. S.) 275, 4 Ann. Cas. 1102; Cleveland &c. R. Co. v. Druien, 26 Ky. L. 103, 80 S. W. 778, 66 L. R. A. 275. See also note in 63 L. R. A. 513 and ante, § 2243. In most of the cases cited the loss did not occur in the state of the forum. In the Federal Courts the question is treated as one of general commercial law, to be determined according to their own views. See Kensington, The,

bind it by contract of carriage.[84] We shall here consider the power of an agent the owner of goods to bind him by agreeing to a stipulation limiting the liability of the carrier. It may be well to add, however, to what has been said in the former connection, that, according to a somewhat recent decision, a railroad company can not indirectly obtain an exemption from liability for its own negligence by limiting the authority of its agents, and an attempt on its part to limit the power of an agent to make contracts of carriage, within the ordinary scope of his authority, by requiring such a condition to be inserted in the contract is nugatory, especially where the shipper is not notified or chargeable with notice of such limited authority.[85] The agent of the owner of goods, who is authorized by him to deliver them to the carrier for transportation, is presumed to have authority to contract with the carrier for that purpose, and the carrier has a right to assume, in the absence of anything to the contrary, that such agent has authority to bind the owner by any contract such as is ordinarily made for transportation of property of the kind offered for carriage. The owner will, therefore, be bound, in such cases by a just and reasonable stipulation limiting the liability of the carrier in the contract made by such agent to the same extent as if it had been made by himself.[86] But circum-

183 U. S. 263, 22 Sup. Ct. 102, 46 L. ed. 190; Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717. See also Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574. But see, where local statute governs, Central R. Co. v. Kavanaugh, 92 Fed. 56. As elsewhere shown the Interstate Commerce Law, with its amendments, now controls.

[84] Ante, § 2166. See also San Antonio &c. R. Co. v. Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

[85] Baltimore &c. R. Co. v. McLaughlin, 73 Fed. 519.

[86] York Co. v. Central R., 3 Wall. (U. S.) 107, 18 L. ed. 170; St. Hubert, The, 102 Fed. 362, 107 Fed. 727; California Powder Works v. Atlantic &c. R. Co, 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648 and note; Brown v. Louisville &c. R. Co., 36 Ill. App. 140; Adams Exp. Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. 279; Robinson v. Merchants' Dispatch &c. Co., 45 Iowa 470; McCann v. Baltimore &c. R. Co., 20 Md. 202; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston &c. R. Co., 144 Mass. 284, 10 N. E. 836; Armstrong v. Chicago &c. R. Co., 53 Minn. 183, 54 N. W. 1059; Nelson v. Hudson River R. Co., 48 N. Y. 498; Zimmer v. New York &c. R. Co., 137 N. Y. 460, 33 N. E.

stances may sometimes rebut the presumption as to the general authority of the agent to bind the owner by a special contract limiting the liability of the carrier,[87] and a few of the courts seem to deny the rule that an agent authorized to deliver and ship goods will be presumed to have authority to agree to any special contract limiting the carrier's liability, and are inclined to look to the real rather than the apparent authority of the agent.[88] The consignor, empowered to ship goods, has been held to have implied authority to make such a contract and thus bind the consignee.[89] And so, a drover or agent in charge of cattle has been held to have such authority to make contracts with connecting carriers necessary to take the cattle to their destination, and thus bind the owner.[90]

642; Missouri Pac. R. Co. v. International &c. Co., 84 Tex. 149, 19 S. W. 459; Gulf &c. R. Co. v. White (Tex. Civ. App.), 32 S. W. 322; Barnett v. London &c. R. Co., 5 H. & N. 604; Aldridge v. Great Western R. Co., 15 C. B. (N. S.) 582. See also Georgia R. Co. v. Gann, 68 Ga. 350.

[87] Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Russell v. Erie R. Co., 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433, 1 Ann. Cas. 672; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Fillebrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606. In the last case just cited it was held to be a question of fact for the jury to determine under the special circumstances of each particular case. So, in American Trans. Co. v. Moore, 5 Mich. 368.

[88] Hayes v. Campbell, 63 Cal. 143; Merchants' Dispatch &c. Co. v. Joesting, 89 Ill. 152; Nonotuck Silk Co. v. Adams Exp. Co., 256 Ill. 66, 99 N. E. 893; Adams Exp. Co. v. Nock, 63 Ky. 562, 87 Am. Dec. 510. See Seller v. Steamship Pacific, 1 Ore. 409; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815. It is argued with some degree of plausibility in several of these cases that the presumption may be that the agent has authority to ship under the common-law liability, but that he can not be presumed to have power to agree to a special contract limiting the carriers' liability. But such contracts were made at common law, and even if they were not, the custom being now almost, if not quite, universal, it is certainly a just presumption that the agent has authority to do what is ordinarily and customarily done in such cases at the present time.

[89] Brown v. Louisville &c. R. Co., 36 Ill. App. 140; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 59 Am. Rep. 589; Donovan v. Standard Oil Co., 155 N. Y. 112, 40 N. E. 678; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Frohlick v. Pennsylvania Co., 138 Mich. 116, 101 N. W. 223, 110 Am. St. 310.

[90] Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162;

§ 2266 (1508). **Stipulation exempting carrier from liability for loss by fire.**—The carrier may also stipulate for immunity from liability for loss or injury to the freight by fire not caused by its own negligence.[91] Such a contract made in accordance with the general rules already stated, is valid. But such a stipulation will not be construed in any jurisdiction as exempting the carrier from liability for its own negligence unless such a construction is unquestionably required,[92] and in most jurisdictions the carrier can not contract for an absolute exemption from all liability for loss or injury by fire caused by its own negligence, no matter how strong and comprehensive the language of the contract may be.[93]

Armstrong v. Chicago &c. R. Co., 53 Minn. 183, 54 N. W. 1059. But it has been held that no such authority will be presumed in the absence of some evidence that they had delivered the stock to the connecting carrier or were authorized to deliver it. Gulf &c. R. Co. v. White (Tex. Civ. App.), 32 S. W. 322. An initial carrier has also been held the agent of the shipper so far as necessary to contract with the connecting carrier. St. Hubert, The, 102 Fed. 362, 107 Fed. 727.

[91] Little Rock &c. R. Co. v. Daniels, 49 Ark. 352, 5 S. W. 584; St. Louis &c. R. Co. v. Bone. 52 Ark. 26, 11 S. W. 958; Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587n; Insurance Co. v. Lake Erie &c. R. Co., 152 Ind. 333, 335, 53 N. E. 382 (citing text); Indianapolis &c. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Smith v. American Express Co., 108 Mich. 572, 66 N. W. 479; Rand v. Merchants' &c. Transp. Co., 59 N. H. 363; Lancaster Mills v. Merchants' &c. Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. 852. Stipulation against liability for fire after unloading held reasonable and valid in Constable v. National &c. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. ed. 903. And it is held in Central of Ga. R. Co. v. Patterson, 12 Ala. App. 369, 68 So. 513, that a stipulation against loss by fire not due to the carrier's negligence may still be made under the Interstate Commerce Law.

[92] Steinweg v. Erie &c. R. Co., 43 N. Y. 123, 3 Am. Rep. 673; Lamb v. Camden &c. R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Montgomery &c. R. Co. v. Edmonds, 41 Ala. 667; Maxwell v. Southern Pac. R. Co., 48 La. Ann. 385, 19 So. 287; Thomas v. Lancaster Mills, 71 Fed. 481, and authorities cited on page 486. See also ante, § 2262.

[93] York Co. v. Central R. Co., 3 Wall. (U. S.) 107, 18 L. ed. 170; Thomas v. Lancaster Mills, 71 Fed. 481; New Orleans &c. Ins. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302; McFadden v. Missouri &c. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; Missouri Pac.

§ 2267 (1509). Stipulations as to insurance.—It is well-settled that a carrier may insure the property in its custody even as against loss occasioned by the negligence of its own servants.[94] But it is held in a comparatively recent case that a stipulation in a bill of lading that the owner, shipper and consignee shall each cause the goods to be insured and that in case of loss the carrier shall have the benefit of the insurance if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor" is void as attempting to protect the carrier against the consequences of its own negligence and is no defense to an action against the carrier for loss caused by such negligence.[95] In another comparatively recent case, however, it was held that the carrier had a right to stipulate for the benefit of such insurance, that it might presume that the shipper's agent had authority to agree thereto and that such a stipulation should not be held invalid, as not being supported by a

R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Houston &c. R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; ante, § 2252. See also Maxwell v. Southern Pac. Co., 48 La. Ann. 385, 19 So. 287; Michigan &c. R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Insurance Co. v. Lake Erie &c. R. Co., 152 Ind. 333, 335, 53 N. E. 382 (citing text); Liverpool &c. Ins. Co. v. McNeill, 89 Fed. 131; Marande v. Texas &c. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. ed. 487.

[94] Phoenix Ins. Co. v. Erie & W. Trans. Co., 10 Biss. (U. S.) 18, 38, affirmed in 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. ed. 873; Waters v. Merchants. &c. Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 691; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 364, 14 L. ed. 452; Home Ins. Co. v. Baltimore &c. Co., 93 U. S. 527, 23 L. ed. 868; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. ed. 63; Copeland v. New England &c. Co., 2 Metc. (Mass.) 432; Minneapolis &c. R. Co. v. Home Ins. Co., 55 Minn. 236, 66 N. W. 132, 22 L. R. A. 390; Platt v. Richmond &c. R. Co., 108 N. Y. 358, 15 N. E. 393; Fayerweather v. Phoenix Ins. Co., 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805; British &c. Ins. Co. v. Gulf &c. R. Co., 63 Tex. 475, 51 Am. Rep. 661; North British &c. Ins. Co. v. London &c. Co., L. R. 5 Ch. Div. 569; Walker v. Maitland, 5 Barn. & Ald. 171; Davidson v. Burnand, L. R. 4 C. P. 117, 121; Crowley v. Cohen, 3 Barn. & Adol. 478. But see in Pennsylvania, Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674.

[95] Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. 674. The court held that the carrier could not compel the shipper to

consideration, merely because there was no corresponding reduction in freight charges.[96] It seems to us that, as the carrier may lawfully insure the goods itself, even as against loss occasioned by the negligence of its own servants, it may also stipulate that it shall have the benefit of the insurance effected by the shipper, and that where the insurance is afterwards effected upon the goods known to be in transitu, in accordance with such a stipulation, the insurance company, in the absence of fraud or concealment, can not defend upon the ground that such a stipulation is invalid,[97] and is not entitled, after payment of the loss, to be subrogated to the rights of the shipper to recover over against the carrier, unless the assured could do so.[98] The carrier, how-

insure for his benefit any more than it could compel him to release it entirely from the consequences of its own negligence, for the reason that it would be contrary to public policy. It is probably true that a stipulation compelling the shipper to insure against the negligence of the carrier for the latter's benefit is invalid, and in this, as well as in other respects, the case just cited may probably be distinguished from other cases which hold that a stipulation that the carrier shall have the benefit of any insurance which may be effected is valid. See Inman v. South Carolina R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. ed. 612; Seaboard, The, 119 Fed. 375; Pennsylvania R. Co. v. Burr, 130 Fed. 847; Roos v. Philadelphia &c. R. Co., 199 Pa. St. 378, 49 Atl. 344; Insurance Co. v. Easton, 73 Tex. 167, 11 S. W. 180.

[96] Missouri Pac. R. Co. v. International &c. Ins. Co., 84 Tex. 149, 19 S. W. 459. But it is held by the same court that a provision that the carrier shall have the benefit of any insurance effected by the shipper does not cover a loss by the carrier's negligence where the policy expressly provides that it shall not cover the carrier's common-law liability. Gulf &c. R. Co. v. Zimmerman, 81 Tex. 605, 17 S. W. 239. See also Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788.

[97] Tate v. Hyslop, L. R. 15 Q. B. Div. 368, 375; Jackson Co. v. Boylston &c. Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728; Phoenix &c. Ins. Co. v. Erie &c. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. ed. 873. See also Merchants' Cotton &c. Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct., 367, 38 L. ed. 195, affirming 91 Tenn. 537, 19 S. W. 755; British &c. Marine Ins. Co. v. Gulf &c. R. Co., 63 Tex. 475, 478, 51 Am. Rep. 661.

[98] Phoenix Ins. Co. v. Erie &c. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. ed. 873; St. Louis, I. M. & S. R. Co. v. Commercial &c. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. ed. 154; Providence Ins. Co. v. Morse, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. ed.

ever, is primarily liable, and the insurance company, having paid the loss, is entitled to be subrogated to the rights of the assured against the carrier where there is no valid stipulation or agreement, such as that to which we have referred, giving the carrier the benefit of the insurance and thus limiting the right of the shipper and the insurance company.[99] So, if the policy of insurance was already in force at the time the bill of lading was executed the shipper and the carrier can not by any agreement of their own deprive the insurance company of its rights,[1] and, according to a comparatively recent decision, if it pays the loss under a policy which provides that it shall be released from liability in case of any agreement made between the insured and any carrier whereby the latter is to have the benefit of the insurance, such company may at the same time impose as a condition of such payment that it shall have the right to proceed against the carrier with which the shipper has made such an agreement.[2]

1013; Jackson Co. v. Boylston &c. Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728; Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173; Platt v. Richmond &c. R. Co., 108 N. Y. 358, 15 N. E. 393. See also Judd & Root v. New York S. S. Co., 128 Fed. 7. The validity of such a stipulation, even where the loss is occasioned by the carrier's negligence, is clearly shown in Rintoul v. New York &c. R. Co., 17 Fed. 905. So, in British &c. Ins. Co. v. Gulf &c. R. Co., 63 Tex. 475, 51 Am. Rep. 661, where it is held that such a stipulation is not forbidden by a statute prohibiting carriers from limiting their common-law liability.

[99] Hall & Long v. Railroad Co., 13 Wall. (U. S.) 367, 20 L. ed. 594; Mobile &c. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527; Providence Ins. Co. v. Morse, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. ed. 1013; Louisville &c. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Home Ins. Co. v. Western Transp. Co., 4 Rob. (N. Y.) 257.

[1] Inman v. South Carolina R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. ed. 612; Carstairs v. Mechanics' &c. Ins. Co., 18 Fed. 473; Insurance Co. v. Easton, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424. Such an agreement made after the execution of the policy will generally invalidate the policy, at least where it contains a provision to that effect or a warranty against such agreements.

[2] Southard v. Minneapolis &c. R. Co., 60 Minn. 382, 62 N. W. 442, 619, 61 Am. & Eng. R. Cas. 282. Compare Lancaster Mills v. Merchants' &c. Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586; and Missouri Pac. R. Co. v. International &c. Ins. Co., 84 Tex. 149, 19 S. W. 459. See also

§ 2268 (1510). Stipulations as to value and amount of damages.—The general rule is well-established by the weight of modern authority, in accordance with reason, that a fair bona fide valuation of goods as a basis for the carrier's charges is binding upon the shipper and that a valid contract may be made limiting the liability of the carrier to that sum where it is supported by a sufficient consideration, such as a reduced rate of freight.[3] There can be no question, we think, as to the justice of the rule as

as to rights of shippers for whose benefit carrier insures, Symmers v. Carroll, 207 N. Y. 632, 101 N. E. 698, 47 L. R. A. (N. S.) 196n, Ann. Cas. 1914C, 685n.

[3] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717; Adams Express Co. v. Cronninger, 226 U. S. 491, 33 Sup. Ct. 391, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n; Missouri &c. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; Great Northern Ry. Co. v. O'Conner, 232 U. S. 508, 34 Sup. Ct. 381, 58 L. ed. 703; Earnest v. Express Co., 1 Woods (U. S. C. C.) 573; Metropolitan Trust Co. v. Railroad Co., 107 Fed. 628; Doyle v. Railroad Co., 126 Fed. 841; South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Louisville &c. R. Co. v. Oden, 80 Ala. 38; Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. 104; Pierce v. Railroad Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, 354; Russell v. Pittsburgh &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Hill v. Boston &c. R. Co., 144 Mass. 284, 10 N. E. 836; Harvey v. Terre Haute &c. R. Co., 74 Mo. 538; Brown v. Wabash &c. R. Co., 18 Mo. App. 568; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Gardner v. Southern R. Co., 127 N. Car. 293, 37 S. E. 328; Baltimore &c. R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214; Missouri &c. R. Co. v. Porter, 41 Okla. 702, 139 Pac. 954; Richmond &c. R. Co. v. Payne, 86 Va. 481, 10 Atl. 749, 6. L. R. A. 849; Hill v. Northern &c. R. Co., 33 Wash. 697, 74 Pac. 1054; Ullman v. Chicago &c. R. Co., 112 Wis. 150, 88 N. W. 41, 50 L. R. A. 246, 88 Am. St. 949. It has also been held that it may be stipulated that the value at the place and time of shipment shall govern. Chicago &c. R. Co. v. Harmon, 17 Ill. App. 640; Rogan v. Wabash R. Co., 51 Mo. App. 665; Southern Pac. Co. v. Phillipson (Tex. Civ. App.), 39 S. W. 958; St. Louis &c. R. Co. v. Hambrick (Tex. Civ. App.), 97 S. W. 1072. See also Davis v. New York &c. R. Co., 70 Minn. 37, 72 N. W. 823; Porteous v. Adams Exp. Co., 112 Minn. 31, 127 N. W. 429. But compare Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65

above stated. Where, however, the valuation is an arbitrary one made by the carrier, or the latter thus seeks to escape liability for its own negligence beyond the amount fixed, and such amount is obviously much less than the true value of the goods, a different question arises. An arbitrary and unreasonable limitation inserted in a bill of lading by the carrier, without any request or notice to the shipper and without consideration or an opportunity to obtain a lower rate of freight in consideration thereof, is not binding upon the shipper.[4] Some of the authorities cited in support of this proposition go still further and

N. W. 458; Erie Dispatch Co. v. Johnston, 87 Tenn. 490, 11 S. W. 441. Under the Cummins Amendment it has been held that a provision of a bill of lading on a through interstate shipment fixing the carrier's liability at the value of the property at the time and place of shipment is invalid and not enforceable. Chicago &c. Ry. Co. v. McCaull-Dinsmore Co., 260 Fed. 835, affirmed in 40 Sup. Ct. 504.

[4] Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 40 So. 29; Georgia Pac. R. Co. v. Hughart, 90 Ala. 36, 8 So. 62; Adams Exp. Co. v. Mellichamp, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D, 976 and note; Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587, and note; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Kansas City &c. R. Co. v. Simpson, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; Louisville &c. R. Co. v. Woodford, 152 Ky. 398, 153 S. W. 722; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; McFadden v. Missouri Pacific R. Co., 92 Mo. 343, 1 Am. St. 721; Kellerman v. Kansas City &c. R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Hanson v. Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78, 138 Am. St. 768; Berry v. Chicago &c. R. Co., 24 S. Dak. 611, 124 N. W. 859; San Antonio &c. R. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139. In Central &c. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 110 Am. St. 170, it is said: "A railroad company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value." Citing Central R. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R.

seem to hold that the valuation must be made by the shipper, but there is conflict upon this point, and it is held in a leading case and others which follow it, that it is immaterial whether the shipper fixes the value or not, so long as he agrees to it by accepting the bill of lading without objection.[5] The most stubborn conflict among the authorities, however, is upon the question of the validity and effect of such a valuation and limitation where the carrier is guilty of negligence. But we believe that most of the apparently conflicting decisions can be reconciled in accordance with the following rules. 1. A bona fide contract, fairly made, in advance, upon sufficient consideration, fixing the value of the property or the rule for ascertaining its value in case of loss or injury, even if the carrier is guilty of negligence, is valid and enforceable, and, if based upon a lower rate of freight in proportion to the decreased liability, "will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation."[6] 2. A stipulation arbitrarily

A. 720; Georgia R. Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. 197; Georgia Southern R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807.

[5] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717. See also John Hood Co. v. American &c. Co., 191 Mass. 27, 77 N. E. 638. But compare Doan v. St. Louis &c. R. Co., 38 Mo. App. 408.

[6] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717; Chicago &c. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. 323, 44 L. R. A. (N. S.) 257n; Hadji, The, 18 Fed. 459; Lydian Monarch, The, 23 Fed. 298; Louisville &c. R. Co. v. Oden, 80 Ala. 38; United States Exp. Co. v. Cohn, 108 Ark. 115, 157 S. W. 144, Ann. Cas. 1915B, 682n; Mering v. Southern Pac. Co., 161 Cal. 297, 119 Pac. 80; Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Adams Exp. Co. v. Welborn, 59 Ind. App. 330, 108 N. E. 163; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Hill v. Boston &c. R. Co., 144 Mass. 284, 10 N. E. 836; Alair v. Northern Pac. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. 588; Rogan v. Wabash R. Co., 51 Mo. App. 665; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Atkinson v. New York &c. Transfer Co., 76 N. J. L. 608, 71 Atl. 278; Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379; Zimmer v. New York &c. R. Co., 137 N. Y. 460, 33 N. E. 642; Baltimore &c. R. Co. v. Hubbard, 72

limiting the amount of recovery, in case of the negligence of the carrier, without regard to the value of the property is invalid,[7] except, perhaps, in the few jurisdictions in which a carrier can contract for an exemption from liabilty for its own negligence. 3. The agreement as to value must be made in good faith and

Ohio St. 302, 74 N. E. 214; St. Louis &c. R. Co. v. Mounts, 44 Okla. 359, 144 Pac. 1036; Elkins v. Empire Transp. Co., 81 Pa. St. 315; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433 and note, 33 Am. St. 881; Winslow v. Atlantic &c. R. Co, 79 S. Car. 344, 60 S. E. 709; Louisville &c. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Starnes v. Louisville &c. R. Co., 91 Tenn. 516, 19 S. W. 675; Larsen v. Oregon &c. R. Co., 38 Utah 130, 110 Pac. 983, Ann. Cas. 1912D, 1242n; Windmiller v. Northern Pac. R. Co., 52 Wash. 613, 101 Pac. 225. See also authorities cited at the end of the next note infra. But compare Galveston &c. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Galt v. Adams Exp. Co., McArthur & M. (D. C.) 124, 48 Am. Rep. 742 (but see Adams Exp. Co. v. Berry &c. Co., 35 App. D. C. 213, 31 L. R. A. (N. S.) 309); Ellison v. Adams Exp. Co., 245 Ill. 410, 92 N. E. 277, L. R. A. 1915A, 502n; Winn v. American Exp. Co., 149 Iowa 259, 128 N. W. 663; Railroad Co. v. Owen, 93 Ky. 201, 19 S. W. 590; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; Illinois Cent. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879; Chicago &c. R. Co. v. Witty, 32 Nebr. 275, 49 N. W. 183, 29 Am. St. 436, note in 88 Am. St. 112; Miller v. Chicago &c. R. Co., 85 Nebr. 458, 123 N. W. 449; Atchison &c. R. Co. v. Rodgers, 16 N. Mex. 120, 113 Pac. 805; Stringfield v. Southern R. Co., 152 N. Car. 125, 67 S. E. 333; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Weiller v. Pennsylvania R. Co., 134 Pa. St. 310, 19 Atl. 702, 19 Am. St. 700; Houston &c. R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308; Chesapeake &c. R. Co. v. Pew, 109 Va. 288, 64 S. E. 35. Such a contract is not in any proper sense a contract primarily against liability for negligence. The carrier has a right to be compensated according to the value of the property, and if the shipper, to obtain a lower rate of freight, fixes that value at less than it really is, it is his own fault, and the fact that, incidentally the effect may be to lessen the liability of the carrier for its own negligence can make no difference. Any other rule would be to encourage bad faith and dishonest dealing on the part of the shipper. See note in 88 Am. St. 106, 107. But an interstate carrier can not limit its liability for loss resulting from its stipulation where only one rate is offered to the shipper so that he has no choice, as where the rate schedule states only one rate. Union Pac. Ry. Co. v. Burke (U. S.), 41 Sup. Ct. 283.

[7] Eells v. St. Louis &c. R. Co., 52 Fed. 903; Georgia &c. R. Co. v.

not forced upon the shipper by unreasonable rates for a higher valuation.[8] 4. A carrier may make reasonable regulations, graduating its compensation according to the value of the property and requiring a disclosure of such value for the purpose of fixing its compensation, and providing that, in case of the failure of the shipper to disclose the value as required, it shall be deemed not to exceed a certain specified sum.[9] 5. If the ship-

Hughart, 90 Ala. 36, 8 So. 62; Boscowitz v. Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587 and note; Baltimore &c. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Adams Exp. Co. v. Hoeing, 88 Ky. 373, 11 S. W. 205; Louisville &c. R. Co. v. Owens, 93 Ky. 201, 19 S. W. 590; Kember v. Southern Exp. Co., 22 La. Ann. 158, 2 Am. Rep. 719; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; Nickey v. St. Louis &c. R. Co., 35 Mo. App. 79; Chicago &c. Co. v. Witty, 32 Nebr. 275, 49 N. W. 183, 29 Am. St. 436; United States Exp. Co. v. Backman, 28 Ohio St. 144; Weiller v. Pennsylvania R. Co., 134 Pa. St. 310, 19 Atl. 702, 19 Am. St. 700; Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55. See also Railway Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Southern R. Co. v. Jones, 132 Ala. 437, 31 So. 501; Everett v. Railroad Co., 138 N. Car. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985. But see Richmond &c. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Johnstone v. Richmond &c. R. Co., 39 S. Car. 55, 17 S. E. 512; Zouch v. Chesapeake &c. R. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, in all of which the distinction we have sought to make is recognized, but the limitation was held valid on the ground that agreeing to the amount of liability was in effect agreeing to the value.

[8] Overland &c. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Louisville &c. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Harrison v. London &c. R. Co., 2 Best & S. 122; Wilson v. Freeman, 3 Camp. 527. See also ante, § 2260, note 58. As to admissibility of evidence of circumstances in such cases, see O'Malley v. Great Northern R., 86 Minn. 380, 90 N. W. 974; Ullman v. Chicago &c. R. Co., 112 Wis. 150, 88 N. W. 41, 56 L. R. A. 246, 88 Am. St. 949.

[9] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717; Calderon v. Atlas Steamship Co., 64 Fed. 874; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Lawrence v. New York &c. R. Co., 36 Conn. 63; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am.

per, upon inquiry duly made by the carrier as to the value of the goods, gives a false valuation, in order to obtain reduced rates, and deceives the carrier thereby, he will be estopped by his fraud from claiming and recovering any greater amount in case they are lost or injured.[10] The effect of the Carmack and Cummins Amendment in the case of interstate shipments will be

Rep. 596; Pacific R. Co. v. Foley, 46 Kans. 457, 26 Pac. 665, 26 Am. St. 107; Brehme v. Adams Exp. Co., 25 Md. 328; Graves v. Lake Shore &c. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Adair v. Northern Pac. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. 588, note in 61 Ann. St. 366, and note in Ann. Cas. 1913D, 982, et seq.; Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Newburger v. Howard & Co.'s Express, 6 Phila. (Pa.) 174; Boorman v. American Exp. Co., 21 Wis. 152. But see Conover v. Pacific Exp. Co., 40 Mo. App. 31. And compare Missouri &c. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 391, 57 L. ed. 690. Where the carrier has actual knowledge of the real value, or it is clearly apparent, it has been held that this rule does not apply. Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Kember v. Southern Exp. Co., 22 La. Ann. 158, 2 Am. Rep. 719; Orndorff v. Adams Exp. Co., 66 Ky. 194, 96 Am. Dec. 207. As to partial loss, where it is provided that the loss or damage shall not exceed a specified sum, see Georgia R. &c. Co. v. Heid, 91 Ga. 377, 17 S. E. 934; Starnes v. Louisville &c. R. Co., 91 Tenn. 516, 19 S. W. 675.

[10] Hayes v. Wells, Fargo Co., 23 Cal. 185, 83 Am. Dec. 89; Chicago &c. R. Co. v. Shea, 66 Ill. 471; Ellison v. Adams Exp. Co., 245 Ill. 410, 92 N. E. 277, L. R. A. 1915A, 502n; Rosenfeld v. Peoria &c. R. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Harvey v. Terre Haute &c. R. Co., 74 Mo. 538; Atkinson v. New York Transfer Co., 76 N. J. L. 608, 71 Atl. 278; Barnes v. Long Island R. Co., 100 N. Y. S. 593; Normile v. Oregon R. &c. Co., 41 Ore. 177, 69 Pac. 928, 932; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. 881; Shackt v. Railroad Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176; McCance v. London &c. R. Co., 7 Hurl. & N. 477. See also Calderon v. Atlas Steamship Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. ed. 1033. The text is quoted with approval as a proper statement of the rules and distinctions in regard to the general subject, in Cramer v. Chicago &c. Ry. Co., 153 Iowa 103, 133 N. W. 387, 39 L. R. A. (N. S.) 168n. Failure to disclose the value has, however, been held not to be fraud upon the carrier, under ordinary circumstances, where no inquiry is made. Railroad Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Adams Express Co. v. Mellichamp, 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D, 976; Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. 227; Southern Exp. Co.

considered in a subsequent section, but it may be well to state here that under the Carmack Amendment notice of the schedule of rates filed under the interstate commerce law must be taken, and, where the rate is approved by the commission it can not well be said to be arbitrary and unreasonable or not to constitute a sufficient consideration.[11]

§ 2269 (1510a). Stipulations that value at place of shipment shall control.—It would seem to follow from the rule allowing a carrier to contract for an agreed valuation in case of loss or injury to a shipment, that the carrier may stipulate with the shipper that the valuation at the point of shipment and not at destination shall control in estimating the damages. And it is found that the state courts generally sustain these stipulations where they are supported by a consideration, such as reduced rate of freight.[12] This rule, of course, could apply without qualification only in cases where the freight has not been prepaid. Where the freight has been paid the valuation at the point of shipment

v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Chicago &c. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. 587. But see Duntley v. Boston &c. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. 610; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442. It has been held that if the owner voluntarily accepts a receipt or the like containing a clause fixing the value, he will be presumed, in the absence of evidence of any unfair advantage being taken of him, to have assented to such valuation. Graves v. Express Co., 176 Mass. 280, 57 N. E. 462; Adair v. Northern &c. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. 588; Michalitschke v. Wells. Fargo & Co., 118 Cal. 683, 50 Pac. 847, note in Ann. Cas. 1913D, 984.

[11] See Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. ed. 901; George N. Pierce Co. v. Wells, Fargo Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. ed. 576; Wabash R. Co. v. Priddy, 179 Ind. 483, 493, 495, 496, 497, 101 N. E. 724; Adams Exp. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096. But conditions and limitations that are void as attempting to relieve the carrier from its own negligence are not good even though the form of contract has been filed with the Interstate Commerce Commission. Boston &c. R. Co. v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. ed. 820, and the Cummins amendments have made some radical changes in the law as it existed under the Carmack amendment.

[12] Louisville &c. R. Co. v. Oden, 80 Ala. 38; Pierce v. Southern &c.

must be increased by the amount paid for freight and interest thereon.[13] But these rules are not everywhere accepted in this country. Some courts regard these stipulations as opposed to public policy,[14] even in cases where interstate transportation is involved.[15] But such stipulations have been held valid under the Carmack Amendment and there is some reason for saying that they are apparently not forbidden even by the Cummins Amendment, as they merely fix the time and place of valuation rather than the value.[16] A recent decision of the Supreme Court of the United States, however, seems to hold otherwise.[16a]

§ 2270 (1511). Stipulation exempting carrier from liability in case of live stock.—A carrier may contract at common law with

R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, 354; Live Stock Co. v. Kansas City &c. R. Co., 100 Mo. App. 674, 75 S. W. 782. See also Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379; Wegener v. Chicago &c. R. Co., 162 Wis. 322, 156 N. W. 201. But compare, as to interstate shipment under Cummins Amendment. Chicago &c. Ry. Co. v. McCaull-Dinsmore Co. (U. S.), 40 Sup. Ct. 504.

[13] Pierce v. Southern &c. R. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, 354; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; Davis v. New York &c. R. Co., 70 Minn. 37, 72 N. W. 823.

[14] International &c. R. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; Illinois Cent. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879; Southern Pac. Co. v. D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813; Rhymer v. Delaware &c. R. Co., 27 Pa. Super. Ct. 345.

[15] Southern Pac. Co. v. D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813; Gulf &c. Ry. Co. v. Vasbinder (Tex. Civ. App.), 172 S. W. 763. (Here an oral contract had been made and the shipper was required to sign a writing containing such a provision, which the shipper did not understand, just as the train was starting. It was held invalid although the shipment was interstate). Compare also Southern Pac. R. Co. v. Meadors, 104 Tex. 469, 140 S. W. 427; Galveston &c. R. Co. v. Sparks (Tex. Civ. App.), 162 S. W. 943. But see as to interstate shipments, Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. ed. 901, and last section in this chapter.

[16] In re Cummins Amendment, 33 I. C. C. 682. See also Wallingford v. Atchison &c. Ry. Co., 101 Kans. 544, 167 Pac. 1136; Gulf &c. R. Co. v. Texas Packing Co., 244 U. S. 31, 37 Sup. Ct. 487, 61 L. ed. 970; Springfield Light &c. Co. v. Norfolk &c. Ry. Co., 260 Fed. 254.

[16a] Chicago &c. Ry. Co. v. McCaull-Dinsmore Co. (U. S.), 40 Sup. Ct. 504.

the owner of live stock that he or his agent shall accompany and care for the stock, or against liability for losses arising from the inherent nature, vice or propensity of the animals themselves and not from its own negligence in running its trains or the like. Such a contract, especially where the owner or his agent goes with the animals to take care of and load and unload them, may exempt the carrier from liability for injury to the animals from overloading, suffocation, heat, or any like cause apart from the negligence of the carrier or its servants.[17] But, according to the weight of authority, it can not thus obtain an exemption from liability for its own negligence in regard to any duty which it owes as a common carrier.[18] So, it has been held that it can not

[17] Central R. &c. Co. v. Smitha, 85 Ala. 47, 4 So. 708; Summerlin v. Seaboard &c. R. Co., 56 Fla. 687, 47 So. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. 164; Georgia R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Lake Shore &c. R. Co. v. Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 So. 698; Atchison v. Chicago &c. R. Co., 80 Mo. 213; St. Louis &c. R. Co. v. Copeland, 23 Okla., 837, 102 Pac. 104; Texas &c. R. Co. v. Davis, 2 Tex. App. (Civil Cases) 156; Houtz v. Union Pac. R. Co., 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628n; Betts v. Farmers' Loan &c. Co., 21 Wis. 80, 91 Am. Dec. 460; Morrison v. Phillips Constr. Co., 44 Wis. 405, 28 Am. Rep. 599. See also Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Ormsby v. Union Pac. R. Co., 4 Fed. 706. But see under statutes in some states; Siemonsma v. Chicago &c. R. Co., 137 Iowa 607, 115 N. W. 230; Brown v. Illinois Cent. R. Co., 100 Ky. 525, 38 S. W. 862; Gulf &c. R. Co. v. Trawick, 68 Tex. 314, 316, 4 S. W. 567, 2 Am. St. 494. The Cummins Amendments also seem to indicate limitations on liability in the case of live stock.

[18] East Tenn. &c. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Atlantic &c. R. Co. v. Dothan Mule Co., 161 Ala. 341, 49 So. 882; St. Louis &c. R. Co. v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A. (N. S.) 546; Welch v. Boston &c. R. Co., 41 Conn. 333; Indianapolis &c. R. Co. v. Allen, 31 Ind. 394; Peck v. Chicago &c. R. Co., 138 Iowa 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883n, 128 Am. St. 185; Atchison &c. R. Co. v. Ditmars, 3 Kans. App. 459, 43 Pac. 833; Baughman v. Louisville &c. R. Co., 94 Ky. 150, 21 S. W. 757; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 524; Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17; Chicago

contract against liability for loss on account of delay thus caused,[19] nor for an exemption from liability for injuries to animals caused by its failure to furnish suitable cars or facilities for loading, unloading, watering and feeding them.[20]

§ 2271 (1512). Stipulations as to manner and time of presenting claims.—A valid contract may be made requiring claims for

&c. R. Co. v. Witty, 32 Nebr. 275, 49 N. W. 183, 29 Am. St. 436; Welsh v. Pittsburg &c. R. Co., 10 Ohio St. 65; Pittsburgh &c. R. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. 732; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Taylor &c. R. Co. v. Montgomery (Tex. App.), 16 S. W. 178; Gulf &c. R. Co. v. Wilhelm, 3 Tex. App. (Civil Cases) 558; Virginia &c. R. Co. v. Sayers, 26 Grat. (Va.) 328; Bosley v. Baltimore &c. R. Co., 54 W. Va. 563, 46 S. E. 613, 615, 66 L. R. A. 871 (quoting text); Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 40 L. R. A. 289, 50 Am. St. 855; Bartlett v. Oregon R. & Nav. Co., 57 Wash. 16, 106 Pac. 487; Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55. But in some states the rule is different where there is no "gross negligence." Georgia &c. R. Co. v. Greer, 2 Ga. App. 516, 518, 58 S. E. 782; Chicago &c. R. Co. v. Calumet Stock Farm, 96 Ill. App. 337, affirmed in 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68n; St. Louis &c. R. Co. v. Copeland, 23 Okla. 837, 102 Pac. 104.

[19] Ormsby v. Union Pac. R. Co., 4 Fed. 706; Ball v. Wabash &c. R. Co., 83 Mo. 574. See also Bosley v. Baltimore &c. R. Co., 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871; Berje v. Texas &c. R. Co., 37 La. Ann. 468; Alabama &c. R. Co. v. Sparks, 71 Miss. 757, 16 So. 263. But see Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Sterger v. Erie R. Co., 5 Hun (N. Y.) 345. Depreciation in the price or loss of a market is not fairly within the terms of a provision requiring notice within a certain time of loss or injury during transportation, and such provision in a live stock contract does not apply where the damage is merely depreciation in market price or loss of market caused by the carrier's negligent delay. Atchison &c. R. Co. v. Poole (Kans.), 87 Pac. 465; Kramer & Co. v. Chicago &c. R. Co., 101 Iowa 178, 70 N. W. 119.

[20] St. Louis &c. R. Co. v. Lesser, 46 Ark. 236; Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Ward v. Chicago &c. R. Co., 87 Kans. 824, 126 Pac. 1083 (nor for negligent failure to provide suitable yards); Rhodes v. Louisville &c. R. Co., 9 Bush (Ky.) 688; Kansas City &c. R. Co. v. Holland, 68 Miss. 351, 8 So. 516; Pittsburgh &c. R. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 35 L. R. A. 737n, 60 Am. St. 732; Norfolk &c. R. Co. v. Harman, 91 Va. 601,

loss or damage to freight to be presented in a certain manner or within a certain time, provided it is reasonable.[21] So, stipulations requiring suit to be brought within a specified time, less than the statute of limitations, have been upheld.[22] In many of

22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855; Chesapeake &c. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Taylor &c. R. Co. v. Montgomery (Tex. App.), 16 S. W. 178. But see Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Hood v. Grand Trunk R. Co., 20 U. Can. C. P. 361. See as to effect of §§ 4386 and 4387 Rev. St. U. S.; Ft. Worth &c. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525; Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Missouri Pac. R. Co. v. Texas &c. R. Co., 41 Fed. 913; Hale v. Missouri Pac. R. Co., 36 Nebr. 266, 54 N. W. 517.

[21] Express Company v. Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556; Black v. Wabash &c. R. Co., 111 Ill. 351, 53 Am. Rep. 628; Chicago &c. R. Co. v. Simms, 18 Ill. App. 68; United States Ex. Co. v. Harris, 51 Ind. 127; Anderson v. Lake Shore &c. R. Co., 26 Ind. App. 196, 59 N. E. 396; Atchison &c. R. Co. v. Temple, 47 Kans. 7, 27 Pac. 98, 13 L. R. A. 362; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Howard v. Illinois Cent. R. Co., 161 Ky. 783, 171 S. W. 442, 445 (citing text); Armstrong v. Chicago &c. R. Co., 53 Minn. 183, 54 N. W. 1059; Southern Exp. Co. v. Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385; Rice v. Kansas Pac. R. Co., 63 Mo. 314; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394; Selby v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88, 37 Am. St. 635; Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431; Bennett v. Northern Pac. R. Co., 12 Ore. 49, 6 Pac. 160; Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568. See also St. Louis &c. R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; Metropolitan Trust Co. v. Toledo &c. R. Co., 107 Fed. 628; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Missouri &c. R. Co. v. Kirkham, 63 Kans. 255, 65 Pac. 261. Other and later authorities to the same effect are cited in the note to Deaver-Jeter Co. v. Southern Ry., 91 S. Car. 503, 74 S. E. 1071, in Ann. Cas. 1914A, 230n, including Nashville &c. Ry. v. Long, 163 Ala. 165, 50 So. 130; St. Louis &c. R. Co. v. Keller, 90 Ark. 308, 119 S. W. 254; Post v. Atlantic &c. R. Co., 138 Ga. 763, 76 S. E. 45; Ridgway Grain Co. v. Pennsylvania R. Co., 228 Pa. St. 641, 77 Atl. 1007, 31 L. R. A. (N. S.) 1178n; Cooke v. Northern Pac. R. Co., 22 N. Dak. 266, 133 N. W. 303, 95n; Williamsport &c. Lumber Co. v. Baltimore &c. R. Co., 71 W. Va. 741, 77 S. E. 333. But the Interstate Commerce Act, under recent amendments, governs as to this matter in the case of interstate shipments. See Barnes' Fed. Code 1921 Supplement § 7876, Act of Feb. 28, 1920, ch. 91, §§ 436-438.

[22] Central Vermont R. Co. v. Soper, 59 Fed. 879; Ginn v. Ogdens-

the cases cited the claim was also required to be presented in writing, and in one case it was held that a stipulation that it should be verified was valid.[23] Like other stipulations of a similar nature, however, it must be fairly made and agreed to, without extortion,[24] and must be reasonable as applied to the facts of the particular case in order to be enforced. If the circumstances are such that the loss or damage can not, by the exercise of reasonable diligence, be discovered within the time limited, the presentation of the claim within a reasonable time thereafter will be sufficient,[25] and, indeed, it has been held in some cases that, if the stipulation is unreasonable as applied to the circum-

burg Transit Co., 85 Fed. 985; Thompson v. Chicago &c. R. Co., 22 Mo. App. 321; Gulf &c. R. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. 494; Gulf &c. R. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; McCarty v. Gulf &c. Co., 79 Tex. 33, 15 S. W. 164. But see Gulf &c. R. Co. v. Hume, 87 Tex. 211, 27 S. W. 110, and Galveston &c. R. Co. v. Herring (Tex.), 36 S. W. 129, in which it is held that under the Texas act of March 4, 1891, no contract can be made, even in case of an interstate shipment, limiting the time for bringing suit to less than two years. See also Cook v. Chicago &c. R. Co., 78 Nebr. 64, 110 N. W. 718; Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; St. Louis &c. R. Co. v. Hambrick (Tex. Civ. App.), 97 S. W. 1072, and Chicago &c. R. Co. v. Thompson, 41 Tex. Civ. App. 459, 93 S. W. 702, to the effect that a limitation as to time of bringing suit or giving notice, though made and valid in another state, will not govern in the state of the former, with which, however, compare Cleveland &c. R. Co. v. Druien, 118 Ky. 237, 80 S. W. 778.

[23] Brown v. Wabash &c. R. Co., 18 Mo. App. 568. So, in Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431.

[24] Atchison &c. R. Co. v. Dill, 48 Kans. 210, 29 Pac. 148.

[25] Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358; Memphis &c. R. Co. v. Holloway, 9 Bax. (Tenn.) 188; Glenn v. Southern Exp. Co., 86 Tenn. 594, 8 S. W. 152; Louisville &c. R. Co. v. Steele, 6 Ind. App. 183, 33 N. E. 236; Case v. Cleveland &c. R. Co., 11 Ind. App. 517, 39 N. E. 426; Wichita &c. R. Co. v. Koch, 47 Kans. 753, 28 Pac. 1013; Atchison &c. R. Co. v. Temple, 47 Kans. 7, 27 Pac. 98; Hinton v. Eastern R., 72 Minn. 339, 75 N. W. 373. See also Rice v. Kansas Pac. R. Co., 63 Mo. 314; Richardson v. Chicago &c. R. Co., 149 Mo. 311, 50 S. W. 782; Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; Holland v. Chicago &c. R. Co., 139 Mo. App. 702, 123 S. W. 987; Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196; Wood v. Southern R. Co., 118 N. Car. 1056, 24 S. E. 704.

stances of the particular case, no notice at all is necessary.[26] Provisions in bills of lading requiring claims for loss or injury to be presented within three,[27] five,[28] ten,[29] thirty,[30] and ninety[31] days from the date of the receipt of the goods, or the unloading of the stock, have been held reasonable, and so has a stipulation requiring written notice of the claim to be given before the stock was removed at the place of destination and mingled with other

[26] Jennings v. Grand Trunk &c. R. Co., 127 N. Y. 438, 28 N. E. 394; Ormsby v. Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. 706; Baltimore &c. R. Exp. Co. v. Cooper, 66 Miss. 558, 6 So. 327, 14 Am. St. 586, 40 Am. & Eng. R. Cas. 97. But see Osterhoudt v. Southern Pac. Co., 47 App. Div. 146, 62 N. Y. S. 134; St. Hubert, The, 102 Fed. 362. In Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56, it was held a question of fact for the jury to determine whether the time limited was reasonable under the circumstances, but as we shall hereafter see, the courts have frequently decided the reasonableness or unreasonableness of such a stipulation in general as a matter of law.

[27] Oxley v. St. Louis &c. R. Co., 65 Mo. 629; Lewis v. Great Western R. Co., 5 H. & N. 867. Even one day or thirty hours after delivery has been held reasonable. Clegg v. St. Louis &c. Ry. Co., 203 Fed. 971; St. Louis &c. R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; Smith v. St. Louis &c. Ry. Co., 186 Mo. App. 401, 171 S. W. 635. See also Riddler v. Missouri Pac. Ry. Co., 184 Mo. App. 709, 171 S. W. 632. But see contra, Jennings v. Grand Trunk &c. R. Co., 127 N. Y. 438, 28 N. E. 394, and compare Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56.

[28] Black v. Wabash &c. R. Co., 111 Ill. 351, 53 Am. Rep. 628; Dunlap v. Chicago &c. Ry. Co., 187 Mo. App. 201, 172 S. W. 1178 (interstate shipment); Dawson v. St. Louis &c. R. Co., 76 Mo. 514; Pavitt v. Lehigh &c. R. Co., 153 Pa. St. 302, 25 Atl. 1107; Anderson v. Lake Shore &c. R. Co., 26 Ind. App. 196, 59 N. E. 396.

[29] Case v. Cleveland &c. R. Co., 11 Ind. App. 517, 39 N. E. 426; Armstrong v. Illinois Cent. R. Co., 162 Ky. 539, 172 S. W. 947, L. R. A. 1915C, 1220n, Ann. Cas. 1916E, 1201n; Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Arctic Bird, The, 109 Fed. 167.

[30] Southern Exp. Co. v. Glenn, 16 Lea (Tenn.) 472, 1 S. W. 102; Weir v. Express Co., 5 Phila. (Pa.) 355; United States Exp. Co. v. Harris, 51 Ind. 127. See also Queen of the Pacific, The, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. ed. 419. But compare Southern Exp. Co. v. Bank, 108 Ala. 517, 18 So. 664; Dixie Cigar Co. v. Southern Exp. Co., 120 N. Car. 348, 27 S. E. 73, 58 Am. St. 795; Capehart v. Seaboard &c. Co., 81 N. Car. 438, 51 Am. Rep. 505.

[31] Express Company v. Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556; Broadwood v. Southern Exp. Co., 148 Ala. 17, 41 So. 769.

stock.[32] But similar provisions have been held unreasonable in other cases where the shipment was for a great distance and the claim was required to be presented at the place of shipment within the time limited from the date of the contract[33] or where the company had no agent of the class specified at the place where the notice was required to be given to such an agent.[34] There is much apparent, and some real, conflict among the

[32] Kansas &c. R. Co. v. Ayres, 63 Ark. 331, 38 S. W. 515; Goggin v. Kansas Pac. R. Co., 12 Kans. 416; Sprague v. Missouri Pac. R. Co., 34 Kans. 347, 8 Pac. 465; Wichita &c. R. Co. v. Koch, 47 Kans. 753, 28 Pac. 1013; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Rice v. Kansas Pac. R. Co., 63 Mo. 314; Selby v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88, 37 Am. St. 635; Duvall v. Norfolk &c. Ry. Co., 167 N. Car. 24, 83 S. E. 21; St. Louis &c. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470. But see Ormsby v. Union Pac. R. Co., 4 Fed. 706; Baxter v. Louisville &c. R. Co., 165 Ill. 78, 45 N. E. 1003; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606, for circumstances under which it may be unreasonable. Compare Mobile &c. R. Co. v. Brownsville &c. Live Stock Co., 123 Tenn. 298, 130 S. W. 788, and Jett & Brooks v. Southern Ry. Co., 130 Tenn. 237, 169 S. W. 767, with Southern R. Co. v. Bacon, 128 Tenn. 169, 159 S. W. 602. See also Jones v. Atlantic Coast &c. R. Co., 148 N. Car. 580, 62 S. E. 701, where the animals were taken out of the car under the direction and charge of the railroad company's agent.

[33] Central Vermont R. Co. v. Soper, 59 Fed. 879; Southern Exp. Co. v. Capterton, 44 Ala. 101, 4 Am. Rep. 118; Southern Exp. Co. v. Tupelo, 108 Ala. 517, 18 So. 664; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Porter v. Southern Exp. Co., 4 S. Car. 135, 16 Am. Rep. 762; Pacific Exp. Co. v. Darnell (Tex.), 6 S. W. 765. But see Queen of the Pacific, The, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. ed. 419; Mercer v. Canadian Pac. R. Co., 17 Ont. L. R. 585, 8 Can. R. Cas. 372.

[34] Good v. Galveston &c. R. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574. See also Engesether v. Great Northern R. Co., 65 Minn. 168, 68 N. W. 4; Carpenter v. Eastern R. Co., 67 Minn. 188, 69 N. W. 720; Galveston &c. R. Co. v. Short (Tex. Civ. App.), 25 S. W. 142. So, where the injury and its extent could not have been discovered within the time. Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; McKinstrey v. Chicago &c. R. Co., 153 Mo. App. 546, 134 S. W. 1061; Missouri &c. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565. As to the rule where the railroad company's agent has full knowledge, compare St. Louis &c. R. Co. v. Cumbie, 101 Ark. 172, 141 S. W. 939 with Chicago &c. R. Co. v. Williams, 101 Ark. 436, 142 S. W. 826, and see Drake v. Nashville &c. R. Co., 125

authorities, and so much depends upon the circumstances of each particular case that no general rule of any great value can be laid down. If the loss or damage can be discovered and the claim presented by the exercise of reasonable diligence within twenty-four hours, we believe that even so short a time as that would not necessarily be unreasonable; but if the loss or damage could not be discovered within that time, or if there is no agent present to whom notice can be given, or if it has to be given at the place of shipment, a long distance away, or the like, a much longer time than twenty-four hours would be insufficient and unreasonable, especially when it begins to run from the date of the contract rather than from the time the goods are delivered at their destination. In some jurisdictions the burden of proving the reasonableness of such a stipulation is upon the carrier, and it is held that the plaintiff need not allege or prove that he duly presented his claim nor give any excuse for failing to do so;[35] but in some other jurisdictions such a stipulation is regarded as a condition precedent, even when not expressly so declared, and performance thereof must be alleged and proved by the plaintiff, or a good excuse shown for failing to present the claim as required.[36] They do

Tenn. 627, 148 S. W. 214.

[35] Wescott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Kelly v. Southern Ry., 84 S. Car. 249, 66 S. E. 198, 137 Am. St. 842; Missouri Pac. R. Co. v. Harris, 67 Tex. 166; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; St. Louis &c. R. Co. v. Brass (Tex.), 133 S. W. 1075; Gulf &c. R. Co. v. Vaughn, 4 Tex. App. (Civil Cases) 269, 16 S. W. 775; St. Louis &c. R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476. See also Kansas City R. Co. v. Pace, 69 Ark. 256, 63 S. W. 62; Cox v. Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Hatch v. Railway Co., 15 N. Dak. 490, 107 N. W. 1087; Malloy v. Railway Co., 109 Wis. 29, 85 N. W. 130.

[36] Chicago &c. R. Co. v. Simms, 18 Ill. App. 68; United States Exp. Co. v. Harris, 51 Ind. 127; Louisville &c. R. Co. v. Widman, 10 Ind. App. 92, 37 N. E. 554; Case v. Cleveland &c. R. Co., 11 Ind. App. 517, 39 N. E. 426; Ray v. Missouri &c. R. Co., 90 Kans. 244, 133 Pac. 847, Ann. Cas. 1915B, 818n; Williamsport &c. Lumber Co. v. Baltimore &c. R. Co., 71 W. Va. 741, 77 S. E. 333. See also Osterhoudt v. Southern Pac. R. Co., 47 App. Div. 146, 62 N. Y. S. 134; Westerfield v. Fargo, 80 Misc. 40, 141 N. Y. S. 844; Kalina v. Railroad Co., 69 Kans. 172, 76 Pac. 438; Westminster, The, 127 Fed. 680; Northern Pac. Exp. Co. v. Martin, 26

not usually apply, however, to cases of mere loss of market or depreciation of market price caused by delay, as this is not considered to be fairly within the meaning of the ordinary limitation requiring notice to be given or suit to be instituted, within a certain time, for loss or injury to the property during transportation.[37] And such a stipulation is not available to a carrier in case of conversion of the goods by the carrier.[38] In the case of interstate shipments the recent Act of Congress, known as the first Cummins Amendment, approved March 4, 1915, to take effect ninety days thereafter, provides that it shall be unlawful for the carrier to limit the time for giving notice of claims to less than ninety days, the filing of claims to less than four months, and the institution of suits to less than two years, and that if the loss, damage or injury was due to delay or damage while loading or unloading, or if shipment was damaged in transit by negligence no notice or filing of claims shall be required as a condition precedent to suit.[39]

Can. Sup. Ct. 135. This seems to us the better rule where the stipulation is clearly a condition precedent, at least when the plaintiff sues on the contract which contains it. See also St. Louis &c. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470. But if the plaintiff need not and does not plead or rely on the contract it is held that the defendant, to do so must plead and prove it. McNealy v. Chicago &c. R. Co., 119 Mo. App. 200, 95 S. W. 312. See generally post, §§ 2276, 2333, 2338; Cox v. Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

[37] Kramer v. Chicago &c. R. Co., 101 Iowa 178, 70 N. W. 119; Atchison &c. R. Co. v. Poole (Kans.), 87 Pac. 465; Baltimore &c. Exp. Co. v. Cooper, 66 Miss. 558, 6 So. 327, 14 Am. St. 587; Leonard v. Chicago &c. R. Co., 54 Mo. App. 293; D. Klass &c. Co. v. Wabash R. Co., 80 Mo. App. 164; Aull v. Missouri Pac. Ry. Co., 136 Mo. App. 291, 116 S. W. 1122. See also Kansas &c. R. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515; Jett & Brooks v. Southern Ry. Co., 130 Tenn. 237, 169 S. W. 767. But many of the forms now used are more comprehensive. See Hamilton v. Wabash R. Co., 80 Mo. App. 597.

[38] Cleveland &c. R. Co. v. Potts, 33 Ind. App. 564, 71 N. E. 685; Chicago &c. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43; Merchants' &c. Transp. Co. v. Moore, 124 Ga. 482, 52 S. E. 802; Ridgeway Grain Co. v. Pennsylvania R. Co., 228 Pa. St. 641, 77 Atl. 1007, 1008, 31 L. R. A. (N. S.) 1178n (citing text). See also Ward v. Missouri &c. R. Co., 158 Mo. 226, 58 S. W. 28.

[39] Fed. St. Ann. Pamphlet Sup. No. 2, p. 30, 38 Stat. 1196; 39 St.

§ 2272 (1513). Miscellaneous stipulations.—We have considered the most important stipulations limiting the liability of the carrier which are usually found in bills of lading or other special contracts, but there are others which have also been adjudged to be valid. Thus, it has been held that a carrier may stipulate against liability for loss by thieves or robbers where its own negligence has in no way occasioned the loss.[40] So, it may stipulate that it shall not be liable for delay caused by strikes or mobs, at least where they are not caused by its own fault and are of such magnitude as to require military force to overcome them.[41] Liability from "leakage" or "breakage" may also be provided against if the carrier is free from negligence.[42] And it has been held that the carrier is not liable for loss caused by the breaking of an axle without its fault, where the special

441 (Act Aug. 9, 1916); Barnes' Fed. Code 1919, § 7976. See also Missouri Pac. R. Co. v. Martindale, 139 Ark. 143, 213 S. W. 777; Bell v. New York Cent. R. Co., 175 N. Y. S. 712, 187 App. Div. 564. The Act of Feb. 28, 1920, Barnes' Fed. Code Supp. § 7976 contains the same provisions, but also provides that such period for instituting suits shall be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim in part thereof. Many stipulations limiting the time for giving notice, presenting claims and the like, although formerly held valid, would not now be valid where this act applies, and the investigation should not be misled by recent decisions of the Supreme Court of the United States, as well as the state courts holding stipulations valid before these acts took effect. Georgia &c. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. 541; St. Louis &c. Ry. Co. v. Starbird, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. 462, 468.

[40] Saratoga, The, 20 Fed. 869; Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 26 Atl. 370, 20 L. R. A. 360; Spinetti v. Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579; Shaw v. Great Western R. Co., L. R. (1894) 1 Q. B. 373. But compare De Rothschild v. Royal &c. Steam Packet Co., 7 Exch. 734; Taylor v. Liverpool &c. Steam Co., L. R. 9 Q. B. 546.

[41] Gulf &c. R. Co. v. Gatewood, 70 Tex. 89, 14 S. W. 913, 10 L. R. A. 419, and note; Leavens v. American Exp. Co., 86 Vt. 342, 85 Atl. 557, Ann. Cas. 1915A, 1188; Hall v. Pennsylvania R. Co., 14 Phila. (Pa.) 414.

[42] Barracouta, The, 39 Fed. 288; Marx v. Britannia, The, 34 Fed. 906; Florida Cotton Oil Co. v. Clyde S. L. Co. (Mass.), 125 N. E. 855; Hill v. Sturgeon, 28 Mo. 323. But not, ordinarily, so as to release the carrier if its negligence causes the loss. See Missouri Valley R.

contract exempts it from liability for any loss caused by any "accident to machinery."[43] Other illustrative cases are cited below.[44]

§ 2273 (1513a). **Miscellaneous stipulations intended to evade rule as to contracts against liability for negligence.**—The rule that a carrier may not stipulate for exemption from liability for losses due to negligence in transportation cannot be evaded by contracts that the goods are shipped at the "owner's risk."[45] Neither, according to a Texas decision, is the rule subject to evasion by a stipulation in an interstate contract of carriage against the presumption of negligence which would arise from proof of certain facts, and prescribing the character of proof necessary to fix the liability for loss of the goods on the carrier. Such a stipulation is regarded as both unreasonable and an attempt to abrogate the rules of evidence by contract.[46]

§ 2274 (1514). **Waiver of stipulation limiting liability or fixing time and manner of presenting claims.**—At common law a stipulation limiting the liability of the carrier or fixing the time

Co. v. Caldwell, 8 Kans. 244; School Dist. v. Boston &c. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Reno v. Hogan, 51 Ky. 63, 54 Am. Dec. 513.

[43] Fairbanks & Co. v. Cincinnati &c. R. Co., 66 Fed. 471.

[44] Courteen v. Kanawha Dispatch, 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182 (right to limit liability as warehouseman while goods are awaiting further conveyance); California Powder Works v. Railroad, 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648 (right to stipulate for exemption or impose restrictions where goods are of a dangerous character).

[45] Nashville &c. R. Co. v. Jackson, 6 Heisk (Tenn.) 271; Pigeon v. Dominion Exp. Co., Rap. Jud. Que. 11 C. S. 276; Aaronson v. Pennsylvania R. Co., 23 Misc. 666, 52 N. Y. S. 95. But see McClure v. Norfolk &c. Ry. Co., 83 W. Va. 473, 98 S. E. 514. And compare Chickasaw Cooperage Co. v. Yazoo &c. R. Co., 141 Ark. 71, 215 S. W. 899.

[46] Southern Pac. Co. v. Phillipson (Tex. Civ. App.), 39 S. W. 958. See also generally Cornelius v. Atchison &c. R. Co., 74 Kans. 599, 87 Pac. 751; Richardson v. New York &c. R. Co., 122 App. Div. 120, 106 N. Y. S. 702; Missouri Pac. R. Co. v. Smith (Tex.), 16 S. W. 803. But compare Merchants &c. Transp. Co. v. Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. 524. For another stipulation held invalid as an attempt to limit liability for negligence, see Boston &c. R. Co. v. Piper, 240 U. S. 439, 38 Sup. Ct. 354, 62 L. ed. 820, Ann. Cas. 1918E, 469.

and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly.[47] Thus where a claim is received and acted upon, after the expiration of the time limited, without any objection on that account, the carrier may be deemed to have waived the benefit of the limitation as to the time for presenting it.[48] So, although it is required to be in writing, receiving and acting or promising to act upon a verbal claim, without objection on that account, will operate as a waiver of such requirement.[49] And a stipulation limiting the

[47] St. Louis &c. R. Co. v. Jacobs, 70 Ark. 401, 68 S. W. 248; Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550; Soper v. Railroad Co., 113 Mich. 443, 71 N. W. 853; Shama v. Chicago &c. Ry. Co., 128 Minn. 522, 151 N. W. 406; Hess v. Missouri Pac. R. Co., 40 Mo. App. 202; McFall v. Railroad Co., 117 Mo. App. 477, 94 S. W. 570; Merrill v. American Exp. Co., 62 N. H. 514; Bennett v. Express Co., 12 Ore. 49, 6 Pac. 160; Glenn v. Southern Exp. Co., 86 Tenn. 594, 8 S. W. 152; Galveston &c. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606. See also Bush v. Curry, 131 Ark. 237, 199 S. W. 375; Adams v. Colorado So. Ry. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412n; Merchants' &c. Transp. Co. v. Moore, 124 Ga. 482, 52 S. E. 802; Howard v. Illinois Cent. R. Co., 161 Ky. 183, 171 S. W. 443; St. Louis &c. R. Co. v. James, 36 Okla. 196, 128 Pac. 279.

[48] Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550, 61 Am. & Eng. R. Cas. 329; Banks v. Pennsylvania R. Co., 111 Minn. 48, 126 N. W. 410; Rice v. Kansas Pac. R. Co., 63 Mo. 314; Marrus v. New Haven Steamboat Co., 30 Misc. 421, 62 N. Y. S. 474; Kelly v. Southern Ry., 84 S. Car. 249, 66 S. E. 198, 137 Am. St. 842; International &c. R. Co. v. Underwood, 62 Tex. 21. But compare Atlantic Coast Line R. Co. v. Bryan, 109 Va. 523, 65 S. E. 30; Virginia &c. Chemical Co. v. Southern Exp. Co., 110 Va. 666, 66 S. E. 838. So of course where the carrier knows of the loss and the delay is caused by the promise of the carrier to pay the claim, and the shipper is thus induced to refrain from filing it or bringing suit until after the time limited. Galveston &c. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 18 S. W. 948; Peoria &c. Ins. Co. v. Hall, 12 Mich. 202.

[49] Wabash R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273 (verification waived); Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198 (verification waived where agent receives claim without objection on that ground, and refuses to act on it for other specific objections stated by him at the time); Atchison &c. R. Co. v. Temple, 47 Kans. 7, 27 Pac. 98, 13 L. R. A. 362; Illinois Cent. R. Co. v. Bo-

liability of the carrier to a certain sum is waived where the carrier, in adjusting the damages, agrees to take the property and pay the shipper a larger sum than that stated in the contract limiting its liability.[50] But it has been held that a shipper has no right to rely upon the promise of a station agent to waive a provision as to the time within which suit must be brought where he knows that such agent has no authority to adjust the claim without first obtaining the consent of the company.[51] And the doctrine of this section permitting waiver by the carrier is modified as to interstate shipment by the Carmack and Cummins Amendments and waiver as to notice of claim is prohibited as amounting in effect to an unjust discrimination.[52]

§ 2275 (1515). Benefit of exemption lost by deviation.—The carrier may lose the benefit of an exemption from liability, or

gard, 78 Miss. 11, 27 So. 879 (verification waived); Rice v. Kansas Pac. R. Co., 63 Mo. 314; Blackmer &c. Pipe Co. v. Mobile &c. R. Co., 137 Mo. App. 479, 119 S. W. 1 (custom to accept verbal notice); Hess v. Missouri Pac. R. Co., 40 Mo. App. 202; Hinkle v. Southern R. Co., 126 N. Car. 932, 36 S. E. 348, 78 Am. St. 685; Bennett v. Northern Pac. Exp. Co., 12 Ore. 49, 6 Pac. 160.

[50] Chicago &c. R. Co. v. Katzenbach, 118 Ind. 174, 20 N. E. 709.

[51] Gulf &c. R. Co. v. Brown (Tex. Civ. App.), 24 S. W. 918; Railway Co. v. Kirkham, 63 Kans. 255, 65 Pac. 261. See also for other cases in which there was no waiver, Westminster, The, 127 Fed. 680; Kidwell v. Oregon &c. R. Co., 208 Fed. 1; Clegg v. St. Louis &c. R. Co., 203 Fed. 971; Riddler v. Missouri Pac. Ry. Co., 184 Mo. App. 709, 171 S. W. 632; Bryan v. Louisville &c. R. Co., 174 N. Car. 177, 93 S. E. 750; Pavitt v. Lehigh &c. R. Co., 153 Pa. St. 302, 25 Atl. 1107.

[52] Fay v. Chicago &c. Ry. Co., 186 Iowa 573, 173 N. W. 69; Abell v. Atchison &c. R. Co., 100 Kans. 238, 164 Pac. 269; Metz v. Boston &c. R. Co., 227 Mass. 307, 116 N. E. 475; Chicago &c. R. Co. v. Brockmeier (Okla.), 168 Pac. 1011; Dean v. Southern R. Co., 107 S. Car. 25, 91 S. E. 1042; and note to Ray v. Missouri &c. R. Co., L. R. A. 1916D, 1049, where the earlier cases are cited. See also to same effect in regard to waiver of many other stipulations in particular instances, Texas &c. R. Co. v. Leatherwood, 250 U. S. 478, 39 Sup. Ct. 516; Georgia &c. R. Co. v. Blish Milling Co., 241 U. S. 190, 197, 36 Sup. Ct. 544, 60 L. ed. 948, 952, Ann. Cas. 1918E, 32; Southern R. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. ed. 836; Chicago &c. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 501n; Southern Ry. Co. v.

limitation thereof, by deviation as well as by a waiver in other ways. We have already considered the liability of the carrier for delay or loss occasioned by deviation irrespective of its effect on the stipulation exempting the carrier from liability. If the deviation in no way occasions the loss it would seem that the carrier ought not to be held liable for a loss clearly within the terms of a valid exemption, but it is doubtful whether the law makes any such distinction. The contract is an entirety, and if the carrier desires the benefit of the exemption it is not unreasonable to hold that all the conditions of the contract should be performed by the carrier on its part. The general rule, therefore, is that during the deviation at least, the carrier loses the benefit of its exemption by special contract and is subject to the common-law liability of such carriers for losses then occurring.[53] This is certainly just, where the loss would not have occurred except for an unnecessary and unjustifiable deviation.

§ 2276 (1516). Burden of proof.—It frequently becomes of the utmost importance, where the carrier claims that its liability is limited by special contract, to determine upon whom rests the burden of proof. Upon some phases of this subject there is

Lewis &c. Co., 139 Tenn. 37, 201 S. W. 131, L. R. A. 1918C, 976.

[53] Hunnewell v. Taber, 2 Sprague (U. S.) 1; Coyne v. Grand Rapids &c. R. Co., 185 Ill. App. 431; Robinson v. Merchants' Dispatch &c. Co., 45 Iowa 470; Goodrich v. Thompson, 44 N. Y. 324; Maghee v. Camden &c. R. Co., 45 N. Y. 514, 6 Am. Rep. 124; Keeney v. Grand Trunk R. Co., 47 N. Y. 525; Uptegrove v. Central R. Co., 37 N. Y. S. 659; Lynch v. New York &c. R. Co., 89 Misc. 472, 153 N. Y. S. 633, affirmed in 156 N. Y. S. 1131; Hand v. Baynes, 4 Whart. (Pa.) 204; Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302, 25 Atl. 1107 (carriage by freight train instead of passenger train as agreed); Sleat v. Flagg, 5 B. & Ald. 342. See also Graham v. Davis, 4 Ohio St. 362; O. K. Transfer &c. Co. v. Neill, 59 Okla. 291, 159 Pac. 272, L. R. A. 1917A, 58; Galveston &c. R. Co. v. Allison, 59 Tex. 193; Pecos &c. R. Co. v. Hughes, 44 Tex. Civ. App. 135, 98 S. W. 410; notes in 35 L. R. A. (N. S.) 1046, and in L. R. A. 1918A. 1064. But a well-known custom or usage may sometimes have an important bearing upon this question. Robertson v. Steamship Co., 139 N. Y. 416, 34 N. E. 1053. But see Louisville &c. Co. v. Rogers, 20 Ind. App. 594, 49 N. E. 970.

sharp conflict among the authorities. Two propositions, however, seem to be pretty well-settled. Proof of loss or nondelivery or injury to freight while in the possession of the carrier usually raises a presumption of negligence or fault on its part and casts the burden upon the carrier to explain or account for the same in some way which will exonerate it,[54] and, if the carrier claims that the loss or damage occurred from some cause excepted in the special contract the burden is upon the carrier to show that fact.[55] As we have seen, however, the carrier is

[54] Nelson v. Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; Transportation Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160; Inman v. South Carolina R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. ed. 612, 37 Am. & Eng. R. Cas. 663, 669; Rintoul v. New York &c. R. Co., 17 Fed. 905; Tygert Co. v. Charles P. Sinnickson, The, 24 Fed. 304; Georgia R. &c. Co. v. Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. 197; Adams Exp. Co. v. Haynes, 42 Ill. 89; Chesapeake &c. R. Co. v. Radbourne, 52 Ill. App. 203; Pennsylvania R. Co. v. Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; Chapman v. New Orleans &c. R. Co., 21 La. Ann. 224, 99 Am. Dec. 722; Little v. Boston &c. R. Co., 66 Maine 239; McGrath v. Northern Pac. R. Co., 121 Minn. 258, 141 N. W. 164, L. R. A. 1915D, 644n; Witting v. St. Louis &c. R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636; George v. Chicago &c. R. Co., 57 Mo. App. 358; Canfield v. Baltimore &c. R. Co., 93 N. Y. 532, 45 Am. Rep. 268; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Merchants' Dispatch &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; St. Louis &c. R. Co. v. Parmer (Tex. Civ. App.), 30 S. W. 1109; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Browning v. Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 10 L. R. A. 415, 23 Am. St. 414. See also Everett v. Norfolk &c. R. Co., 138 N. Car. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; Priscilla, The, 106 Fed. 739; Gulf &c. R. Co. v. Roberts (Tex. Civ. App.), 85 S. W. 479; Bonfiglio v. Lake Shore &c. R. Co., 125 Mich. 476, 84 N. W. 722; Warren Adams, The, 163 U. S. 679, 74 Fed. 413, 41 L. ed. 305.

[55] Cumming v. Barracouta, The, 40 Fed. 498; Empire State Cattle Co. v. Atchison &c. R. Co., 129 Fed. 480; South &c. R. Co. v. Henlien, 52 Ala. 606; 23 Am. Rep. 578; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Louisville &c. R. Co. v. Dunlap, 148 Ala. 23, 41 So. 826; St. Louis &c. R. Co. v. Lesser, 46 Ark. 236; Bennett v. Filyaw, 1 Fla. 403; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339 and note, 32 Am. St. 239; Kallman v. United States Exp. Co., 3 Kans. 205; Kalmer v. Union Pac. R. Co., 69 Kans. 172, 76 Pac. 438; Chapman v. New Orleans &c. R. Co., 21 La. Ann. 224, 99 Am. Dec. 722; Baltimore

generally liable for its own negligence even though the loss was from some excepted cause, such as fire or the like occasioned by its failure to exercise due care. In many of the states the burden is upon the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was, on its part, no negligence or want of due care,[56] or, at least, none which was a proximate cause of the loss. But the weight

&c. R. Co. v. Brady, 32 Md. 333; Alden v. Pearson, 3 Gray (Mass.) 342; Lindsley v. Chicago &c. R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. 692; McGrath v. Northern Pac. R. Co., 121 Minn. 258, 141 N. W. 164, L. R. A. 1915D, 644n; Kansas City &c. R. Co. v. Heard, 87 Miss. 378, 39 So. 1011; Witting v. St. Louis &c. R. Co., 28 Mo. App. 103; Mitchell v. Railroad Co., 124 N. Car. 236, 32 S. E. 671, 44 L. R. A. 515; Parker v. Atlantic &c. R. Co., 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827; Gaines v. Union &c. Co., 28 Ohio St. 418; Verner v. Sweitzer, 32 Pa. St. 208; Schaeffer v. Railroad, 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. 884; Merchants' Dispatch &c. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. 847; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19; Freedom, The, L. R. 3 P. C. 594. Many of the above cases hold that the burden is upon the carrier to plead and prove the special contract limiting its liability. To this effect are also Schaeffer v. Philadelphia &c. R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. 884; Missouri Pac. R. Co. v. Wichita &c. Co., 55 Kans. 525, 40 Pac. 899; Atchison &c. R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Fillebrown v. Grand Trunk R. Co., 55 Maine 462, 92 Am. Dec. 606; Carpenter v. Baltimore &c. R. Co., 6 Penn. (Del.) 15, 64 Atl. 252, 4 L. R. A. (N. S.) 858. But we do not believe that this rule can prevail in all cases in all jurisdictions.

[56] Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Louisville &c. R. Co. v. Touart, 97 Ala. 514, 11 So. 756; Southern R. Co. v. Levy, 144 Ala. 614, 39 So. 95; Berry v. Cooper, 28 Ga. 543; Columbus &c. R. Co. v. Kennedy, 78 Ga. 646 (under a statute); Shriver v. Sioux City &c. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Shea v. Minneapolis &c. R. Co., 63 Minn. 228, 65 N. W. 458; Hinton v. Eastern R. Co., 72 Minn. 339, 75 N. W. 373; McGrath v. Northern Pac. R. Co., 121 Minn. 258, 141 N. W. 164, L. R. A. 1915D, 644n; Chicago &c. R. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534; Railroad Co. v. Lawler, 40 Nebr. 356, 58 N. W. 968; Mitchell v. Carolina Cent. R. Co., 124 N. Car. 236, 32 S. E. 671, 44 L. R. A. 515; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Gaines v. Union &c. Co., 28 Ohio St. 418; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19;

of authority supports the rule that, after the loss is once shown to be within the exception, the burden is upon the plaintiff to show negligence upon the part of the carrier.[57] Eminent judges and text writers approve the former rule and much may be said

Slater v. South Car. R. Co., 29 S. Car. 96, 6 S. E. 936; Crawford v. Southern R. Co., 56 S. Car. 136, 34 S. E. 80; Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589; Texas &c. R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619; Brown v. Adams Exp. Co., 15 W. Va. 812. See also Boies v. Hartford &c. R. Co., 37 Conn. 272, 9 Am. Rep. 347; Mears v. New York &c. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; Adams Exp. Co. v. Stattaners, 61 Ill. 184, 14 Am. Rep. 57; Dunseth v. Wade, 3 Ill. 285; Kansas City &c. R. Co. v. Heard, 87 Miss. 378, 39 So. 1011; Chicago &c. R. Co. v. Manning, 23 Nebr. 552; Baltimore &c. R. Co. v. Oriental Oil Co., 51 Tex. Civ. App. 336, 111 S. W. 979.

[57] Wertheirmer v. Pennsylvania R. Co., 17 Blatch. (U. S.) 421; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Transportation Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160; Little Rock &c. R. Co. v. Talbot, 39 Ark. 523; Little Rock &c. R. Co. v. Harper, 44 Ark. 208; Insurance Co. v. Lake Erie &c. R. Co., 152 Ind. 333, 339, 53 N. E. 382 (citing text and numerous decisions); Mitchell v. United States Exp. Co., 46 Iowa 214; Kallman v. United States Exp. Co., 3 Kans. 205; Kansas Pac. R. Co. v. Reynolds, 8 Kans. 623 (but see Chicago &c. R. Co. v. Dunlap, 71 Kans. 67, 80 Pac. 34); New Orleans &c. Co. v. New Orleans &c. R. Co., 20 La. Ann. 302; Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659; Jordan v. American Exp. Co., 86 Maine 225, 29 Atl. 980; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. 479; Read v. St. Louis &c. R. Co., 60 Mo. 199; Davis v. Wabash &c. R. Co., 89 Mo. 340, 1 S. W. 327; Witting v. St. Louis &c. R. Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636; Michaels v. Adams Exp. Co., 71 N. J. L. 41, 59 Atl. 142; French v. Buffalo &c. R. Co., 4 Keyes (N. Y.) 108; Whitworth v. Erie &c. R. Co., 87 N. Y. 413; Smith v. North Carolina R. Co., 64 N. Car. 235; Farnham v. Camden &c. R. Co., 55 Pa. St. 53; Hubbard v. Harnden's Express Co., 10 R. I. 244; Railway Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Marsh v. Horne, 5 Barn. & Cress, 322; Ohrloff v. Briscall, L. R. 1 P. C. App. 231. See also Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239; Lenox, The, 90 Fed. 308; Washburn-Crosby Co. v. William Johnston Co., 125 Fed. 273; Indianapolis &c. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Morse v. Canadian Pac. R. Co., 97 Maine 77, 53 Atl. 874; Schaller v. Chicago &c. R. Co., 97 Wis. 31, 71 N. W. 1042; Glendanock, The, L. R. (1894) P. 226, 63 L. J. P. 89; note in L. R. A.

in its favor,[58] but we are inclined to think that the latter is supported by the better reason as well as by the weight of authority.[59] It has also been held by some of the courts that where the property consists of live stock or perishable fruit, or the like, which is peculiarly liable to injury or deterioration because of its inherent nature or vice, it is not enough for the

1915D, 653, et seq. Where there is no evidence as to how the loss occurred the presumption may be against the carrier, but where it is shown to be within the exception and the circumstances do not import negligence on the part of the carrier the burden is upon the plaintiff to prove negligence, which is generally a question of fact for the jury. Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678, 30 Am. St. 800.

[58] See note in 88 Am. St. 122. The reasons for this rule are that the facts are best known to the carrier and that it is required by public policy. It may also be urged with plausibility that when the plaintiff makes out a prima facie case by showing the delivery and loss it can not be justly said that this is rebutted by showing that it occurred by reason of a cause which was within the exception, where the exception does not cover negligence and such cause does not exclude negligence, but is compatible therewith.

[59] The burden is upon the plaintiff, where the loss is from an excepted cause, to make out a case entitling him to recover, and this he can not do without showing negligence on the part of the carrier. It is well settled that negligence is a wrong which is never presumed, although it may be proved by circumstances or inferred therefrom. When the loss is shown to be within the exception the case does not rest upon the common-law duty or liability of the carrier as and insurer, but upon negligence, and it does not seem just to indulge the same presumption against the carrier in the latter as in the former case. It seems to us that public policy certainly does not require it and that the rule that the burden is upon him who best knows the facts was not meant to be applied to such a case. If that rule were applied indiscriminately it would cast the burden in very many cases upon the defendant to show that he was not guilty of wrong and reverse the usual presumption of innocence and care rather than guilt and negligence. "When he (the carrier) has shown a loss within the exception of his contract, without apparent negligence, he has brought himself within the terms of his bargain. On what principle is that bargain to be nullified by requiring of him the production of that evidence, the loss or difficulty of obtaining which was the very reason for limiting his responsibility?" Patterson v. Clyde, 67 Pa. St. 500. See also Witting v. St. Louis R. Co., 101 Mo. App. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636; Mistrot &c. Co. v. Mis-

shipper to show that it was delivered by the carrier in a damaged condition,[60] and so it has been held that where the shipper goes with the stock and agrees to take care of it he must show negligence on the part of the carrier and freedom from negligence on his part.[61] It can not be said, however, that either of these propositions is settled law in all jurisdictions.[62] But the rule which affirms that the burden is on the shipper in such cases rests, we think, on solid foundations. It seems to have been sometimes overlooked, but there are few, if any, well-considered cases in which it has been expressly denied.[63]

souri &c. R. Co. (Tex. Civ. App.), 209 S. W. 775; 3 Elliott Ev. § 1916.

[60] Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; Hussey v. Saragossa, The, 3 Woods (U. S. C. C.) 380. See also Pittsburgh &c. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Pittsburgh &c. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Michigan &c. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Hindoustan, The, 67 Fed. 794, note in L. R. A. 1915D, 658 et seq.

[61] St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. 104; Atlantic &c. R. Co. v. Dexter, 50 Fla. 180, 39 So. 634; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 17 L. R. A. 339, and note, 32 Am. St. 239; Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Louisville &c. R. Co. v. Hedger, 72 Ky. 645, 15 Am. Rep. 740; McBeath v. Wabash &c. R. Co., 20 Mo. App. 445. See also Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Clark v. St. Louis &c. R. Co., 64 Mo. 440, 448. In such a case he is presumed to know the facts as well as the carrier, and the rule that the burden is upon the party who has peculiar knowledge of the facts which is sometimes invoked to cast the burden upon the carrier, is held not to apply, no matter what the rule may be in other cases. See post, §§ 2333, 2338, for additional authorities and a further consideration of the question.

[62] See Central R. &c. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. 37; Hull v. Chicago &c. R. Co., 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. 722; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534; Phoenix &c. Works v. Pittsburgh &c. R. Co., 139 Pa. St. 284, 20 Atl. 1058; Crawford v. Southern R. Co., 56 S. Car. 136, 34 S. E. 80.

[63] The text is quoted with approval in St. Louis &c. Ry. Co. v. Grant (Tex. Civ. App.), 174 S. W. 714, 715. See also Lane v. Oregon &c. R. Co. (Idaho), 198 Pac. 671; Colsch v. Chicago &c. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013n, Ann. Cas. 1912C, 915n (quoting § 2338, post); Mosteller v. Iowa Cent. R. Co., 153 Iowa 390, 133 N. W. 748.

§ 2277. **Acts of Congress—Interstate shipments.**—The Carmack Amendment not only supersedes state laws and makes the initial carrier liable in the case of interstate shipments as already shown in another chapter, but it also superseded such laws where they prohibited or nullified all contracts limiting the carrier's liability for loss or damage to the agreed or declared value upon which a lower rate is based.[64] The liability under this amendment, it is said, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as interpreted by the Federal Courts.[65] It includes, however, loss or damage caused by unreasonable delay as well as injury to the goods or failure to deliver, and the initial carrier is liable for damages for loss of the market because of unreasonable delay.[66] A limitation of liability to an agreed valuation to secure the lower of two freight rates is valid,[67] and such a limitation in the uniform bill of lading issued by the initial carrier, including "every service to be performed there-

[64] Chicago &c. R. Co. v. Cramer, 232 U. S. 490, 34 Sup. Ct. 383, 58 L. ed. 697; Missouri &c. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690.

[65] Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n. See also Chicago &c. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. 323, 44 L. R. A. (N. S.) 257n; Boston &c. R. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593n; Missouri &c. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690.

[66] New York &c. R. Co. v. Peninsula Produce Co., 240 U. S. 34, 36 Sup. Ct. 230, 60 L. ed. 511, L. R. A. 1917A, 193.

[67] Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 321, 44 L. R. A. (N. S.) 257n; Kansas City &c. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683; Missouri &c. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; Boston &c. R. Co. v. Piper, 246 U. S. 438, 38 Sup. Ct. 354, 62 L. ed. 820, Ann. Cas. 1918E, 469. But not if only one rate is offered. Union Pac. R. Co. v. Burke (U. S.), 41 Sup. Ct. 282 (distinguishing Reid v. American Exp. Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. ed. 1156). Nor, it seems, can stipulation as to value at place and time of shipment prevent the recovery of actual loss. Chicago &c. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504. But see Springfield Light &c. Co. v. Norfolk &c. Ry. Co., 260 Fed. 254; Bowman-Kranz Lumber Co. v. Bush (Nebr.), 176 N. W. 91.

under" and "whether or not the loss or damage occurs from negligence" is valid and applies in favor of the terminal carrier even as to its responsibility as a warehouseman.[68] The shipper as well as the carrier is bound to take notice of the tariff rates filed under the interstate commerce law and if the tariff or schedule so filed offers two rates based on value and the carrier may limit its liability to the agreed or declared valuation made to obtain the lower rate, even though no inquiry was made as to the actual rate;[69] and even where there is a contract for interstate shipment without any limitation therein as to liability as to agreed value it is held that if the carrier's published tariffs on file with the Interstate Commerce Commission graduate the rates according to fixed and declared value and limit the carrier's liability accordingly the shipper must take notice thereof and can not ordinarily, at least, recover a larger amount.[70] So, gross disproportion between the actual value of an interstate shipment and the value fixed in the receipt does not prevent the application of the rule under the Carmack Amendment that the carrier may limit its liability to an agreed value given to secure a lower rate.[71] But the Act of Congress of March 4, 1915, makes

[68] Cleveland &c. R. Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. ed. 453.

[69] Adams Exp. Co. v. Croninger, 226 U. S. 509, 33 Sup. Ct. 148, 57 L. ed. 321, 44 L. R. A. (N. S.) 257; Kansas City &c. R. Co. v. Carl, 227 U. S. 652, 33 Sup. Ct. 391, 57 L. ed. 688; Chicago &c. R. Co. v. Cramer, 232 U. S. 490, 34 Sup. Ct. 383, 58 L. ed. 697; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. ed. 703; Boston &c. R. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593n; also stating that the rate made out and filed is notice, and its effect is not lost, although it is not posted in the station, citing Texas &c. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 225, 50 L. ed. 1011; Chicago &c. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 501. See also Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724; Cleveland &c. R. Co. v. Hollowell, 172 Ind. 466, 88 N. E. 680; Cleveland &c. R. Co. v. Blind, 182 Ind. 398, 105 N. E. 483; Adams Exp. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096.

[70] Atchison &c. R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 586, 58 L. ed. 901.

[71] George N. Pierce Co. v. Wells Fargo Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. ed. 576, affirming 189 Fed. 561. Upon this and some other propositions stated in the

some important changes in the law. It not only includes shipments from one state to another but also to a state or territory from the District of Columbia and from a state or territory to the District of Columbia, and "from any point in the United States to a point in an adjacent foreign country," or for transportation wholly within a territory, and provides that the carrier shall be liable for "the full actual loss, or injury" to the lawful holder of the receipt or bill of lading, or to any party entitled to recover thereon, whether issued or not, "caused by any such common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void; Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules."[72] This proviso, however, is greatly

text there is some conflict among the state decisions, but as the Federal decisions govern cases, under the Carmack Amendment, we have not cited state decisions generally either for or against the propositions stated. So, the Cummins Amendments, as hereinafter shown, have made changes in the law.

[72] Fed. St. Ann. Pamphlet Supp. No. 2, p. 30; Act Mar. 4, 1915, C. 104, § 20; 24 St. 386. See last section in chapter on Initial Carrier. So, as there shown and as stated in § 2271, it contains a provision as to the time of giving notice, filing claims and bringing suit. This act was not to take effect until ninety days after its passage.

changed by the still later act of August 9, 1916, known as the second Cummins Amendment, which substitutes the following proviso: "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as to the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to Regulate Commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other uses."[73] Under this amendment it has been held that the shipper is not restricted to a recovery of the declared value of the goods where the interstate carrier does not obtain from the Interstate Commerce Commission the right to adopt alternative rates based on declared value of shipments.[74] These amendments are not retroactive and do not, therefore, apply to shipments made and causes of action accruing

[73] Act Aug. 9, 1916, ch. 301.

[74] Western Assur. Co. v. Wells Fargo & Co., 143 Minn. 60, 173 N. W. 402.

before they took effect.[75] There is also a provision in Transportation Act 1920, that if the loss, damage or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water.[76]

[75] Northern Pac. R. Co. v. Wall, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. ed. 905; St. Louis &c. R. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. ed. 917; Washington Horse Exch. v. Louisville &c. R. Co., 171 N. Car. 65, 87 S. E. 941. Compare Western Assur. Co. v. Wells Fargo & Co., 143 Minn. 60, 173 N. W. 402.

[76] Act Feb. 28, 1920, c. 91, §§ 434-438; Barnes' Fed. Code Supp. 1921, § 7976.

CHAPTER LXXI

DELIVERY BY THE CARRIER

Sec.
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§ 2285 (1517.) **Generally.**—A common carrier engages not only to carry safely but also to deliver.[1] Its duty as a common carrier and its liability as an insurer is not terminated, ordinarily, until there is a delivery of the goods,[2] either actual or under such circumstances as to constitute a constructive delivery. Stated in the most general and comprehensive terms, the delivery must be made within and at a reasonable time, to the right

[1] North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 269, 31 L. ed. 287; South and North Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419; Chicago &c. R. Co. v. King, 104 Ark. 215, 148 S. W. 1035; Wilson v. California &c. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Parker v. Flagg, 26 Maine 181, 45 Am. Dec. 101; Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Lamb v. Camden &c. R. Co., 2 Daly (N. Y.) 454; Shenk v. Philadelphia Steam &c. Co., 60 Pa. St. 109, 100 Am. Dec. 541; Bodenham v. Bennett, 4 Price 31; Duff v. Budd, 3 Brod. & B. 177.

[2] Cavallaro v. Railway Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. 94; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Hall v. Boston &c. R. Co., 96 Mass. 439, 92 Am. Dec. 783; Smith v. Nashua

person, at the proper place and in a proper manner.[3] As we shall hereafter show, however, an actual personal delivery is not always required, especially in the case of a railroad company.[4] No general rule, applicable to all cases, can be stated as to what constitutes a good and sufficient delivery. Much necessarily depends upon the circumstances of each particular case, and whether there has or has not been a sufficient delivery in the particular case is usually, but not always, a question of fact, or a mixed question of law and fact, for the jury under proper instructions by the court.[5]

§ 2286 (1518.) **Personal Delivery.**—At common law ordinary carriers, such as carriers by wagon, were required to make a personal delivery of the goods to the consignee or other proper person at his house or place of business, but, in the case of railroad companies, which have fixed routes and depots or places for delivery, a well-settled custom has grown up, as in the case

&c. R. Co., 27 N. H. 86, 59 Am. Dec. 364; Richards v. London &c. R. Co., 7 C. B. 839; Fowles v. Great Western &c. R. Co., 7 Exch. 699.

[3] Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Hill v. Humphreys, 5 Watts & S. (Pa.) 123, 39 Am. Dec. 117; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434. See also Chicago &c. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 510 and note.

[4] Post, § 2286; Atchison &c. R. Co. v. Interstate Com. Com., 188 Fed. 229.

[5] Hedges v. Hudson River R. Co., 6 Robt. (N. Y.) 119; Derosia v. Winona &c. R. Co., 18 Minn. 133; Quiggin v. Duff, 1 M. & W. 174; McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188; Columbus &c. R. Co. v. Flournoy, 75 Ga. 745. See also Alabama &c. R. Co. v. Eichofer, 100 Ala. 224, 14 So. 56; Louisville &c. R. Co. v. Bernheim, 113 Ala. 489, 21 So. 405, 59 Am. St. 129; Louisville &c. R. Co. v. Price, 159 Ala. 213, 48 So. 814, 133 Am. St. 32; Jarrett v. Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Mitchell Coal &c. Co. v. Pennsylvania R. Co., 230 U. S. 247, 263, 33 Sup. Ct. 916, 57 L. ed. 1472, Ann. Cas. 1915A, 315n. The first case above cited was reversed on appeal, the court holding that as the facts were undisputed, the question was one of law for the court. Hedges v. Hudson River R. Co., 49 N. Y. 223. See also Seaboard &c. Ry. v. Phillips, 108 Md. 285, 70 Atl. 232, Ann. Cas. 1913A, 1303; Whitney Mfg. Co. v. Richmond &c. R. Co., 38 S. Car. 365, 17 S. E. 147, 37 Am. St. 767.

of vessels, to deliver at those places, and personal delivery at the residence or place of business of the consignee is not required.[6] But if the goods are directed to a particular place by street and number and "streetage" or "cartage," is charged for transporting and delivering them there, in addition to the regular charges for transportation and delivery at the depot, it is the duty of the carrier to deliver them at the designated place.[7] So, where the consignee had his elevator on the line of the road and was prepared to receive grain shipped to such place directly from the cars into the elevator it was held that the reason for relaxing the common-law rule requiring personal delivery did not apply and that it was the duty of the railroad company to make a personal delivery at the elevator to which the grain was consigned.[8] We think there can be no doubt that the company may bind itself to make a personal delivery, in such cases, by express contract, and that even in the absence of such contract, custom may, in the particular instance, require it to do so.[9]

[6] South and North Ala. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Bansemer v. Toledo &c. R. Co., 25 Ind. 434, 87 Am. Dec. 367; Francis v. Dubuque &c. R. Co., 25 Iowa 60, 95 Am. Dec. 769; Jeffersonville R. Co. v. Cleveland, 2 Bush (Ky.) 468; Thomas v. Boston R. Co., 51 Mass. 472, 43 Am. Dec. 444; New Orleans &c. R. Co. v. Tyson, 46 Miss. 729; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23. See also Jarrett v. Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Evershed v. London &c. R. Co., 2 Q. B. Div. 254, 46 L. J. Q. B. Div. 289. Even where a statute requires the delivery of grain to the warehouse or elevator to which it is consigned, the company is required to only do so when it can by using the tracks which it has a right to use, and can not be compelled to run its cars over tracks it does not own and has no right to use. Hoyt v. Chicago &c. R. Co., 93 Ill. 601. See also Stetler v. Chicago &c. R. Co., 49 Wis. 609, 6 N. W. 303.

[7] Baltimore &c. R. Co. v. Green, 25 Md. 72; Schroeder v. Hudson River R. Co., 5 Duer (N. Y.) 55; Cahn v. Michigan Cent. R. Co., 71 Ill. 96.

[8] Vincent v. Chicago &c. R. Co., 49 Ill. 33, approved in State v. Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

[9] See Pittsburgh &c. R. Co. v. Nash, 43 Ind. 423; Gates v. Detroit &c. R. Co., 158 Mich. 477, 122 N. W. 1078; Texas &c. R. Co. v. Driskell, 61 Tex. Civ. App. 310, 128 S. W. 466. In New York Cent. &c. R. Co. v. General Elec. Co.,

§ 2287 (1519.) Place of Delivery.—The delivery must be made at a suitable place.[10] As a general rule the depot or warehouse of the company at the town or station to which the goods are shipped is the proper place.[11] But if the carrier, having no depot or warehouse in such town, is directed by the proper party to leave them at a particular place therein, compliance therewith will be sufficient.[12] This rule applies where the consignee directs them to be delivered at a different place from that specified in the contract, or accepts them at a different place.[13] There is no

219 N. Y. 227, 114 N. E. 115, 1 A. L. R. 1417n, 1421, 1422, it is said: "With the days of railroads delivery came to be expected at freight houses or other terminals. They are still the place of delivery where the factories and warehouses of shippers and consignees do not connect with the tracks. In our time, however, private sidings have become common, and freight is carried over them between the railroad and the plant. Such carriage is commonly a part of the work of transportation." See also Banner Grain Co. v. Great Northern R. Co., 119 Minn. 68, 137 N. W. 161, 41 L. R. A. (N. S.) 678.

[10] Jewell v. Grand Trunk R. Co., 55 N. H. 84; Rooth v. Northeastern R. Co., L. R. 2 Exch. 173. See also Cogdell v. Wilmington &c. R. Co., 124 N. Car. 302, 32 S. E. 706, 710 (citing text); Bachant v. Boston &c. R., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408 (both holding the company liable for personal injuries to person engaged in unloading); Benbow v. North Carolina R. Co., 61 N. Car. 421, 98 Am. Dec. 76. Place must be accessible to consignee. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908. Placing on side tracks may not be sufficient. Klass Comm. Co. v. Wabash R. Co., 80 Mo. App. 164; Loeb v. Wabash R. Co. (Mo. App.), 85 S. W. 118. But see South &c. R. Co. v. Wood, 66 Ala. 167, 41 Am. R. 749; Southern R. Co. v. Barclay, 1 Ala. App. 348, 56 So. 26.

[11] Norway Plains Co. v. Boston &c. R. Co., 67 Mass. 263, 61 Am. Dec. 423; Loeb v. Wabash R. Co. (Mo. App.), 85 S. W. 118; Richardson v. Goddard, 23 How. (U. S.) 28, 39, 16 L. ed. 412.

[12] Rowe v. Pickford, 8 Taunt. 83, 1 Moore 526; Dixon v. Baldwen, 5 East 175; Scott v. Pettit, 3 Bos. & P. 469. And the unqualified refusal of a consignee to receive goods tendered to it by the carrier has been held to be a waiver of the right to insist on a delivery at the usual place. Central R. Co. v. Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. 58. See generally, Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Jewell v. Grand Trunk R. Co., 55 N. H. 84.

[13] London &c. R. v. Bartlett, 7 H. & N. 400; Cork Distilleries Co. v. Great Southern &c. Co., L. R. 7 H. L. 269; Sweet v. Barney, 23 N.

obligation, however, as a general rule, to receive goods at a different station or place from that to which they are consigned, and the company can not escape liability by tendering the goods at a different place.[14] But, in the absence of anything to the contrary, custom, known and acquiesced in by the parties, may justify the railroad company in delivering the freight at a public or an independent warehouse or elevator.[15] Usage or custom often controls,[16] and it is held that the carrier may make reasonable regulations as to the place.[17] Where goods were shipped to a place named Flesherton and it appeared that such was the name both of the railroad station and of a village, about five miles away, where the consignee had his place of business, it was held that the destination of the goods was the station and not the village, and that a shed at such station where the com-

Y. 335; Cleveland &c. R. Co. v. Sargent, 19 Ohio St. 438; Lewis v. Western R. Co., 11 Met. (Mass.) 509. See also Vaughn v. New York &c. R. Co., 27 R. I. 235, 61 Atl. 695. But not if the carrier knows that the title has not passed to the consignee or that he has no right to change the destination. Southern Ex. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285.

[14] Toledo &c. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, and note, 34 Am. St. 579; Mahon v. Blake, 125 Mass. 477; Gulf &c. R. Co. v. Clark, 2 Tex. App. (Civil Cases) 459, 18 Am. & Eng. R. Cas. 628. See also Edwards v. Railroad Co., 32 S. Car. 117, 10 S. E. 822; St. Louis R. Co. v. Rose, 20 Ill. App. 670; Benbow v. North Car. R. Co., 61 N. Car. 421, 98 Am. Dec. 76; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Meyer v. Chicago &c. R. Co., 24 Wis. 566, 1 Am. Rep. 207; Perkins v. Smith, 1 Wils. 328, and also Gulf &c. R. Co. v. A. B. Frank Co. (La.), 48 S. W. 210. Trover will usually lie as for conversion of the goods.

[15] Arthur v. St. Paul &c. R. Co., 38 Minn. 95, 35 N. W. 718; Black v. Ashley, 80 Mich. 90, 44 N. W. 1120. See also Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; Farmers' &c. Bank v. Champlain &c. Co., 16 Vt. 52, 42 Am. Dec. 491 and note.

[16] Gates v. Detroit &c. R. Co., 158 Mich. 477, 122 N. W. 1078. See also Missouri &c. R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702; Erie R. Co. v. Wanagene Lumber Co., 75 N. J. L. 878, 69 Atl. 168. But it is held that it must have been known to the consignee Denver &c. R. Co. v. De Witt, 1 Colo. App. 419, 29 Pac. 524; Packard v. Earle, 113 Mass. 280.

[17] Louisville &c. R. Co. v. Higdon, 149 Ky. 321, 148 S. W. 26; Donovan v. Texas &c. R. Co., 64 Tex. 519.

pany was in the habit of unloading and storing goods was a warehouse within the meaning of a bill of lading providing that the responsibility of the company should cease when the goods were placed in the company's warehouse at their final destination.[18] So, where a company simply agreed to carry goods to a certain place, it was held that its duty was performed when it carried them safely to its depot at that place and then notified and gave the consignee an opportunity to receive, inspect and take them away, and that, in the absence of any controlling custom, it was under no obligation to deliver them to another company for ultimate delivery at a more convenient place.[19] In another recent case the same court held that when goods are shipped to a place where the company has no depot and no agent it is a good delivery to leave the car on a side-track, and if there is no side-track, it may unload them, at least where they are not perishable—the freight in this case being a carload of bricks—and leave them on the ground even though the consignee is not present, and that it has no right to carry them to the next station upon finding no one present at the former place to receive them.[20]

[18] Richardson v. Canadian Pac. R. Co., 19 Ont. 369, 45 Am. & Eng. R. Cas. 413. See Homesly v. Elias, 66 N. Car. 330; Reiss v. Texas &c. R. Co., 98 Fed. 537, 99 Fed. 1006; Marande v. Texas &c. R. Co., 102 Fed. 246 (reversed in 184 U. S. 173, 22 Sup. Ct. 340, 46 L. ed. 487, on another ground). But compare Texas &c. R. Co. v. Clayton, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. ed. 725.

[19] Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762; Anthony &c. Co. v. New York Cent. &c. R. Co., 223 N. Y. 21, 119 N. E. 90, L. R. A. 1918F, 1085. See also New York Cent. &c. R. Co. v. General Elec. Co., 219 N. Y. 227, 114 N. E. 115, 1 A. L. R. 1417n; Central Stock Yds. Co. v. Louisville &c. R. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565. As to when, if at all, the carrier is required to shift or transfer cars after arrival at destination, see cases above cited; also International Agricultural Co. v. Southern R. Co., 188 Ala. 354, 66 So. 14; Seaboard Air Line R. Co. v. Dixon, 140 Ga. 804, 79 S. E. 1118; Interstate Com. Com. v. Atchison &c. R. Co., 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319. And as to redelivery at intermediate point see notes in 15 L. R. A. (N. S.) 756, and L. R. A. 1918B, 79.

[20] Louisville &c. R. Co. v. Gilmer, 89 Ala. 534, 7 So. 654, 42 Am. & Eng. R. Cas. 450. See also South &c. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749. But compare Levers v. Atchison &c. R. Co., 22 N. Mex. 599, 166 Pac. 1178, L.

It seems, however, that a vendor who contracts to deliver goods "f. o. b." at a place to which they are shipped, and has fully performed his contract, is not entitled to recover for the loss of the goods by fire after their arrival and before they are unloaded, although, as between the owner to whom they were consigned and the carrier, the goods might not have been completely delivered.[21]

§ 2288 (1520.) **Time of Delivery.**—The delivery must be made at a proper time[22] as well as at a proper place. So, it is the duty of the carrier to deliver within a reasonable time.[23] What is a reasonable time necessarily depends, to some extent, upon the peculiar circumstances of each particular case, and is usually a question of fact, or a mixed question of law and fact,

R. A. 1918A, 294; and note to Rothschild Bros. v. Northern Pac. R. Co., in 40 L. R. A. (N. S.) 773, citing Yuille-Miller Co. v. Chicago &c. R. Co., 164 Mich. 58, 128 N. W. 1099.

[21] Capehart v. Furman Imp. Co., 103 Ala. 671, 16 So. 625, 49 Am. St. 60.

[22] Grafton, The, 1 Blatchf. (U. S. C. C.) 173; Missouri &c. R. Co. v. Wichita &c. Co., 55 Kans. 525, 40 Pac. 899; Ely v. New Haven &c. Co., 53 Barb. (N. Y.) 207; Hill v. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434. It would seem that Sunday, a legal holiday, or after business hours is not a reasonable time and that the consignee is not bound to take the goods away on such a day. See Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Missouri Pac. R. Co. v. Wichita &c. Co., 55 Kans. 525, 40 Pac. 899; Morgan v. Dibble, 29 Tex. 107, 94 Am. Dec. 264; Texas &c. R. Co. v. Schneider, 1 Tex. App. Civ. Cas. § 118; Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381. But it has been held that a carrier is not liable for unloading on a holiday. Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412; Sleade v. Payne, 14 La. Ann. 453; Shelton v. Merchants' &c. Co., 59 N. Y. 258. See also Schew v. Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. 426 and note; Penna R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (where such is the custom).

[23] St. Louis &c. R. Co. v. Heath, 41 Ark. 476; Central R. &c. Co. v. Georgia Fruit &c. Exch., 91 Ga. 389, 17 S. E. 904, 44 Am. St. 37; Florida Cent. &c. R. Co. v. Berry, 116 Ga. 19, 42 S. E. 371; Hewett v. Chicago &c. R. Co., 63 Iowa 611, 19 N. W. 790; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194; Chickering v. Fowler, 4 Pick. (Mass.) 371; Davis v. Jacksonville &c. R. Co., 126 Mo. 69, 28 S. W.

for the jury, under proper instructions.[24] Where the consignee sent for the goods on Saturday afternoon, but was told that they

965; Gates v. Chicago &c. R. Co., 42 Nebr. 379, 60 N. W. 583; Nelson v. Chicago &c. R. Co., 78 Nebr. 57, 110 N. W. 741; Coffin v. New York &c. R. Co., 64 Barb. (N. Y.) 379; Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211 and note; Cope v. Cordova, 1 Rawle (Pa.) 203; Harley v. Southern R. Co., 75 S. Car. 321, 55 S. E. 760; Gulf &c. R. Co. v. Baugh (Tex. Civ. App.), 42 S. W. 245, 43 S. W. 557. Pickett v. Downer, 4 Vt. 21; McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Hughes v. Great Western &c. R. Co., 14 C. B. 637; Kennedy v. American Ex. Co., 22 Ont. App. 278. But see Geismer v. Lake Shore &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, holding that this is not an absolute duty. Circumstances may excuse the failure to deliver in what would ordinarily be a reasonable time. Davis v. Garret, 6 Bing. 716; Taylor v. Great Northern R. Co., L. R. 1 C. P. 385; Briddon v. Great Northern R. Co., 28 L. J. Exch. 51; Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 So. 765; Lipford v. Charlotte R. Co., 7 Rich. (S. Car.) 409. But if it has expressly contracted to deliver in a certain time it must do so. Donohoe v. London &c. R. Co., 15 Week. R. 792; Pickford v. Grand Junction R. Co., 12 Mees. & W. 766.

[24] Columbus &c. R. Co. v. Flournoy, 75 Ga. 745; Derosia v. Winona &c. R. Co., 18 Minn. 133; Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 So. 765; McGraw v. Baltimore &c. R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Wren v. Eastern &c. R. Co., 1 L. T. N. S. 5; Hales v. London &c. R. Co., 4 B. & S. 66. See also Roth v. Railroad, 34 N. Y. 548, 90 Am. Dec. 736; Tallahasse Mfg. Co., 128 Ala. 167, 29 So. 203; Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Welch v. Concord R. Co., 68 N. H. 206, 44 Atl. 304; Burr v. Express Co., 71 N. J. L. 263, 58 Atl. 609; Berry v. West Virginia R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781. See also for delay held unreasonable, St. Louis &c. R. Co. v. Gunter, 44 Tex. Civ. App. 480, 99 S. W. 152. In Southern R. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454, 456, it is said: "It is claimed that the railroad company is not responsible for any consequence that might result from delay, for the reason that the railroad yards at Birmingham were in such condition that the car could not have been handled with greater dispatch; the freight agent of the defendant at Birmingham having testified that the car 'was delayed on account of the large amount of business being handled at that time,' and that it was moved as soon as possible after its receipt, and a yard clerk having testified that 'the car was moved as soon as practicable, and not moved sooner, as stated, because of the congested condition of the yards.' We recognize the rule that a railroad company will not be responsible for delay if the car is transported with as much

would be late in arriving, and that he need not call for them again until Monday, and the goods arrived about sundown Saturday evening and were burned in the company's warehouse before Monday morning, it was held that the carrier was liable, although the consignee had been informed in the meantime of their arrival.[25] But where heavy freight was shipped on a steamboat, and it was customary for the consignee to be present to receive the goods at the dock, it was held that the carrier was not liable as for conversion, although, in the absence of any one to guard the goods, or any convenient place to store them, they were kept on board the boat until its return the next day.[26]

§ 2289 (1521.) **Manner of Delivery.**—We have already considered the mode or manner of delivery in treating of personal delivery and the time and place of delivery and little remains to be said upon the subject. The carrier must afford the consignee an opportunity to remove the goods and should provide reasonable facilities for unloading and enabling him to remove them.[27]

dispatch as possible under the actual circumstances which exist at the time; that is, what would be a reasonable time for the transportation of a car between given points can not be fixed by any invariable rule, but it depends to a large extent upon the circumstances as they exist at the time that the company attempts to effect the transportation, but a railroad company can not relieve itself from responsibility for delay by simply showing a condition of affairs in regard to its own business which brought about the delay, unless it also appears that the condition of affairs was unprecedented, could not have been foreseen, and therefore was not due to its fault. Mere proof that a car was not promptly transported, for the reason that the yards of the company were in such condition that it could not be moved earlier, ought not to be allowed as an excuse for delay, unless it is shown that the company was not responsible for the crowded condition of its yards at that time; that is, that a condition of affairs had arisen which was unusual and with which they could not deal in the usual manner." Distinguishing and limiting, Smith v. Cleveland &c. R. Co., 92 Ga. 539, 18 S. E. 977.

[25] Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773. See also Parker v. Milwaukee &c. R. Co., 30 Wis. 689. But compare Francis v. Dubuque &c. R. Co., 25 Iowa 60, 95 Am. Dec. 769.

[26] Hattie Palmer, The, 63 Fed. 1015.

[27] See Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73; Myrick v.

Delivery in a particular manner may doubtless be provided for by contract, but in the absence of any specific provision upon the subject it is determined very largely by custom. In delivering grain, coal or similar articles in an elevator or warehouse the carrier should not mix it with other articles of the same kind so that it can not be separated, for in the absence of any provision or controlling custom to the contrary, the consignee is not bound to accept anything in place of the specific article shipped, and the carrier is liable if it wrongfully mixes it with articles of an inferior kind or grade so that it can not deliver the specific article.[28] But a custom has grown up to store grain in elevators with other grain of the same kind and quality and it is generally held in such a case that it is sufficient if the owner receives an equivalent quantity of grain of the same quality, although not the identical grain that he originally owned.[29] Where goods are shipped to a place where there is a side-track, but no depot, platform or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the side-track is a good delivery and relieves the company from further responsibility.[30] It was also held, upon a second appeal of the

Michigan Cent. R. Co., 9 Biss. (U. S. C. C.) 44; Oregon &c. R. Co. v. Ilwaco &c. Co., 51 Fed. 611; Independence Mills Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Moses v. Boston &c. R. Co., 32 N. H. 523, 64 Am. Dec. 381; Cogdell v. Wilmington &c. R. Co., 124 N. Car. 302, 32 S. E. 706, 710 (citing text); Frasier v. Charleston R. Co., 73 S. Car. 140, 52 S. E. 964; Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883; Hungerford v. Winnebago &c. Co., 33 Wis. 303. And sometimes it is the duty of the carrier to unload.

[28] Rice v. Boston &c. R. Co., 98 Mass. 212; Leader v. Northern R. Co., 3 Ont. 92, 16 Am. & Eng. R. Cas. 287. See also Eaton v. Neumark, 37 Fed. 375; Idaho, The, 93 U. S. 575, 23 L. ed. 978; Augusta, The, 29 Fed. 334.

[29] Forbes v. Fitchburg R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 80; Arthur v. Chicago &c. R. Co., 61 Iowa 648, 16 Am. & Eng. R. Cas. 283. See also Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430. But compare Leader v. Northern R. Co., 3 Ont. 92, 16 Am. & Eng. R. Cas. 287.

[30] South & North Alabama R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, citing Wells v. Wilmington

case just referred to, that, while the burden is usually upon the carrier to exculpate itself where goods are delivered in a damaged condition, yet, as the plaintiff claimed that there was a failure to deliver part of the goods and not that they were injured, and as the car had remained for several days on the side-track with no one in charge of it the burden was upon him to show that the loss occurred between the time when they were received by the company and the time when the car was left upon the side-track.[31] So the rule has been laid down in other cases that "where the carrier is not required in the usual course of business or expected to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like," its liability as a common carrier is terminated "by delivering the car in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business, or, if no place of delivery is thus designated or required, on its side-track in the usual and customary place for unloading by consignees."[32] We do not mean

&c. R. Co., 51 N. Car. 47, 72 Am. Dec. 556. See also McMasters v. Pennsylvania R., 69 Pa. St. 374, 8 Am. Rep. 264; Allain v. Pennsylvania R. Co., 183 Pa. St. 174, 38 Atl. 709, 39 L. R. A. 535; Gratiot &c. Co. v. Railroad Co., 221 Ill. 418, 77 N. E. 675. But compare Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. And see Livers v. Atchison &c. R. Co., 22 N. Mex. 599, 166 Pac. 1178, L. R. A. 1918A, 294 and note.

[31] South & North Alabama R. Co. v. Wood, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267.

[32] Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 61 Am. & Eng. R. Cas. 208, 37 Am. St. 238, and other Illinois cases there cited. See also Pittsburgh &c. R. Co. v. Nash, 43 Ind. 423; Southwestern R. Co. v. Felder, 46 Ga. 433; Whitney Mfg. Co. v. Richmond &c. R. Co., 38 S. Car. 365, 17 S. E. 147, 37 Am. St. 767; Armistead Lumber Co. v. Louisville &c. R. Co. (Miss.), 11 So. 472. This is generally true where the bill of lading is properly surrendered or, perhaps, where the car is so placed under such circumstances and the consignee is properly notified. Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 77 N. W. 255; Rothschild Bros. v. Northern Pac. R. Co., 68 Wash. 527, 123 Pac. 1011, 40 L. R. A. (N. S.) 773n. In a Minnesota case it is said: "It is usual for the consignees themselves to unload and carry away these kinds of freight: (coal, lumber and the like) directly from the cars. It is also true * * * that there is nothing to prevent a carrier, at

to approve this rule to the full extent of admitting that, under ordinary circumstances, the carrier's liability is at once terminated without notice or the lapse of a reasonable time for the consignee to unload or remove the freight, but we refer to it and the authorities in which it is announced in support of the doctrine that, under some circumstances, delivery may be made in the cars of the company on a side-track or other proper and customary place. A railroad company is not bound to deliver goods piecemeal and at different times, and the owner or consignee has no right to require it to do so to suit his convenience.[33]

§ 2290 (1522.) **Custom and usage.**—As we have said, custom frequently exerts an important influence in determining the time, place and manner of delivery.[34] A general custom of the business or a well-established usage at the place of delivery usually becomes a part of the contract and governs as to the place, time and mode of making the delivery.[35] Thus, carriers have been

least under special circumstances, from using the car as a warehouse for the storage of freight. But in the case of portable boxes or valuable merchandise we think that under ordinary circumstances, * * * in order to terminate the carrier's liability he must remove the goods from the car in which they were transported and place them for safe-keeping in his freight house." Kirk v. Chicago &c. R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397, 61 Am. & Eng. R. Cas. 203.

[33] Morris &c. R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215. Nor to insist on using the car as a warehouse for storage of small or package freight. Kirk v. Chicago R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397; Schumacher v. Chicago &c. R. Co., 207 Ill. 199, 69 N. E. 825.

[34] Chicago &c. R. Co. v. Reyman, 166 Ind. 278, 73 N. E. 587, 76 N. E. 970; Sleade v. Payne, 14 La. Ann. 453; Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Shelton v. Merchants' Disp. Transp. Co., 59 N. Y. 258; Railroad Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; 2 Elliott Cont. § 1732.

[35] Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412; Higgins v. United States &c. Co., 3 Blatchf. (U. S. C. C.) 282; Blossom v. Smith, 3 Blatchf. (U. S. C. C.) 316; Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507; Arthur v. St. Paul &c. R. Co., 38 Minn. 95, 35 N. W. 718; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; New York Cent. &c. R. Co. v. Standard Oil Co., 87 N. Y. 486; Farmers' &c. Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec.

held liable for loss occasioned by departing from an established custom,[36] and so, on the other hand they have been relieved from further liability by complying with such a custom. It has been held, however, that if the carrier relies on a custom or upon the instructions of the consignee as to the manner of delivering the goods, it must show that it has fully complied with such custom or instructions.[37] An example of the influence of custom is found in a recent case. It was shown that the carrier had been accustomed to deliver goods to an independent warehouseman whose custom it was to notify the consignee and that the consignee was aware of this custom and had long acquiesced in it. The court held that the liability of the carrier ended with the delivery of the goods to the warehouseman, and that it was not liable for the loss of the goods by fire while in the warehouse.[38] So, it has been held that where there are two places in the same town for the delivery of freight, one being the depot proper and the other a platform, where heavy and bulky articles were usually deposited, the usage of the place as to which would be the proper point for delivering cotton bales, may be shown, where neither is specifically designated.[39] As a general rule, however, unless the course of dealing between the parties has been such as to render proof of a general custom unnecessary,[40] the usage must be lawful, general, uniform and certain, or at least such that the parties should have known it and must be presumed to have contracted or dealt with reference to it, and no usage can override a valid express and specific contract.[41]

491 and note; Farmers' &c. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Glover, The, 1 Brown Adm. 166.

[36] Southern Exp. Co. v. Everett, 37 Ga. 688. See also Richmond v. Union Steamboat Co., 87 N. Y. 240.

[37] Baldwin v. American Exp. Co., 23 Ill. 197, 74 Am. Dec. 190; Haslam v. Adams' Exp. Co., 6 Bosw. (N. Y.) 235. And custom or usage will not relieve it from liability for negligence. Hibler v. McCartney, 31 Ala. 501.

[38] Black v. Ashley, 80 Mich. 90, 44 N. W. 1120.

[39] Homesly v. Elias, 66 N. Car. 330. See also McMasters v. Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

[40] See Barnes v. Foley, 5 Burr. 2711; Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507.

[41] Benson v. Gray, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262. See

§ 2291 (1523.) **Delivery must be to right person.**—The rule in regard to the person to whom delivery must be made is very strict. It must be made to the right person,[42] and it seems that neither the fraud or imposition of any one else nor mistake on the part of the carrier will excuse it from liability if it delivers the goods to the wrong person.[43] The right person is, ordinarily, the consignee or his authorized agent.[44] But if the carrier de-

also Dickinson v. Gay, 89 Mass. 29, 83 Am. Dec. 656; Powell v. Thompson, 80 Ala. 51; Georgia R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312; Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. 504 and note; Emery v. Boston &c. Insurance Co., 138 Mass. 398; Simmons v. Law, 3 Keyes (N. Y.) 217; Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626.

[42] Ante, § 2146, and following notes to this section. See also Stowe v. United States Exp. Co., 179 Mich. 349, 146 N. W. 158, 159 (citing text).

[43] New York Cent. &c. R. Co. v. Bank, 195 Fed. 456; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Little Rock &c. R. Co. v. Glidewell, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539; American &c. Exp. Co. v. Milk, 73 Ill. 224; Pacific Exp. Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. 324; American Exp. Co. v. Stack, 29 Ind. 27; Cleveland &c. R. Co. v. Wright, 25 Ind. App. 525, 58 N. E. 559; McEntee v. New Jersey &c. Co., 45 N. Y. 34, 6 Am. Rep. 28; Viner v. New York &c. Co., 50 N. Y. 23; Guillaume v. General Transp. Co., 100 N. Y. 491, 3 N. E. 489; Shenk v. Philadelphia Propeller Co., 60 Pa. St. 109, 100 Am. Dec. 541; Wernwag v. Philadelphia R. Co., 117 Pa. St. 46, 11 Atl. 868; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 118; Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365; More v. Baltimore &c. R. Co., 103 Va. 189, 48 S. E. 887; Meyer v. Chicago &c. R. Co., 24 Wis. 566, 1 Am. Rep. 207; Duff v. Budd, 3 Brod. & B. 177; Stephenson v. Hart, 4 Bing. 476. See also post, § 2295. And see Atlanta &c. R. Co. v. Howard &c. Co., 125 Ga. 478, 54 S. E. 530; Merchants' &c. Transp. Co. v. Moore & Co., 124 Ga. 482, 52 S. E. 802; Southern &c. R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45; Cavallaro v. Texas &c. R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. 94; Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 108 N. W. 706 (custom to deliver to person presenting unindorsed receipt without inquiry, unknown to shipper, no defense); Dudley v. Chicago R. Co., 58 W. Va. 604, 52 S. E. 718, 112 Am. St. 1027; note in 9 Am. St. 513.

[44] Ante, § 2146, and authorities there cited. See also Equitable Powder Mfg. Co. v. St. Louis &c. R. Co., 105 Ark. 697, 150 S. W. 1028; Southern Exp. Co. v. Caper-

livers to any one, even to the consignee, without the production of the bill of lading, it runs the risk of having to show a delivery in accordance with the terms thereof,[45] and where a vendor ships goods and takes a bill of lading in his own name or to his order, the carrier can not safely deliver the goods to any one else unless the bill is indorsed or transferred by him and produced by the person to whom they are delivered.[46] Indeed, it has been held

ton, 44 Ala. 101, 4 Am. Rep. 118; Nebraska Meal Mills v. Railway Co., 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. 183; Adams v. Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Southern Exp. Co. v. Everett, 37 Ga. 688; Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Sturges v. Detroit &c. R. Co., 166 Mich. 231, 131 N. W. 706; Dyer v. Great Northern R. Co., 51 Minn. 345, 53 N. W. 714, 38 Am. St. 506; Hoare v. Great Western R. Co., 37 L. T. R. (N. S.) 186, 25 W. R. 63. See for case in which agency was held not to have been sufficiently shown, Southern Exp. Co. v. Freeze, 141 Ark. 161, 216 S. W. 303.

[45] Mobile &c. R. Co. v. Bay Shore Lumber Co., 165 Ala. 610, 51 So. 956, 138 Am. St. 84; Atlantic &c. R. Co. v. Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168; McEwen v. Jeffersonville &c. R. Co., 33 Ind. 368, 5 Am. Rep. 216; Jeffersonville &c. R. Co. v. Irvin, 46 Ind. 180; Union Pac. R. Co. v. Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. 540; First Nat. Bank v. Northern R. Co., 58 N. H. 203; City Bank v. Rome &c. R. Co., 44 N. Y. 136; Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626; Nat. Bank of Chester v. Atlanta &c. R. Co., 25 S. Car. 216; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; First Nat. Bank v. Northern Pac. R. Co., 28 Wash. 439, 68 Pac. 965. See also Boatman's Sav. Bank v. Western &c. Co., 81 Ga. 221, 7 S. E. 125; Seaboard &c. Ry. Co. v. Phillips, 108 Md. 285, 70 Atl. 232; Louisville &c. R. Co. v. United States Fidelity &c. Co., 125 Tenn. 658, 148 S. W. 671; Nashville &c. R. Co. v. Grayson County Nat. Bank, 100 Tex. 17, 93 S. W. 431.

[46] Young v. East Alabama R. Co., 80 Ala. 100; Arkansas &c. R. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. 276. See ante, §§ 2146, 2147. See also Union Pac. R. Co. v. Johnson, 45 Nebr. 57, 63 N. W. 144, 50 Am. St. 540; Grayson County Nat. Bank v. Nashville &c. Ry. (Tex. Civ. App.), 79 S. W. 1094. So, where draft is attached with direction to notify. General Electric Co. v. Southern R. Co., 72 S. Car. 251, 51 S. E. 695, 110 Am. St. 600; Atlantic Nat. Bank v. Railway Co., 106 Fed. 623; Raleigh &c. R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867; Wright &c. Co. v. Warren, 177 Mass. 283, 58 N. E. 1082.

that where the bill of lading requires the goods to be delivered to the consignor, the mere production of the bill by another, unindorsed by the consignor, will not justify the carrier in delivering them to such other person, unless the consignor intended to pass the title to the goods by the transfer of the bill of lading without indorsement, and that a mere local custom to deliver goods to any person who produces the bill of lading unindorsed does not bind the shipper, at least where he has no knowledge of such custom.[47] But in another recent case it was held that a railroad company could safely deliver goods to the consignee in good faith, without the production of the bill of lading, where they were billed "straight" to the consignee and not to either his or the consignor's "order," by showing a custom to so deliver goods, without the production of the bill of lading, in reliance upon the way-bill, and that such delivery would be good as against parties who had made advances to the consignee and taken the bill of lading as security.[48]

[47] Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650. 9 Am. St. 504 and note; citing Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; Lawrence v. Minturn, 17 How. (U. S.) 100, 15 L. ed. 58; Wilson v. Bauman, 80 Ill. 493; Couch v. Watson Coal Co., 46 Iowa 17; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Alderman v. Eastern R. Co., 115 Mass. 233; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Congar v. Galena &c. R. Co., 17 Wis. 477; and distinguishing Merchants' Bank v. Union R. &c. Co., 69 N. Y. 374; Lickbarrow v. Mason, 2 T. R. 63; Dows v. Greene, 24 N. Y. 638; Allen v. Williams, 12 Pick. (Mass.) 297. See ante, §§ 2148, 2149, 2151. See also North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; Louisville &c. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Florence &c. R. Co. v. Jensen, 48 Colo. 28, 108 Pac. 974; Nat. Bank of Phoenixville v. Philadelphia R. Co., 163 Pa. St. 467, 30 Atl. 228; Cane Belt R. Co. v. Pedin Iron &c. Co., 45 Tex. Civ. App. 630, 101 S. W. 528; Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 108 N. W. 706; Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. 505. But compare Missouri Pacific R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944.

[48] Forbes v. Boston &c. R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76, 80. But see ante, §§ 2146, 2149. That the carrier may be protected in a proper case even if it does not require production of the bill of lading if it shows it delivered to the right party, see Gates v. Chi-

§ 2292 (1524.) **Delivery to agent.**—So strict is the rule in regard to delivery to the right person that the carrier who delivers the goods to any one for the consignee without the bill of lading or an order from the latter does so at its peril.[49] Thus, a delivery to a drayman or cartman who has no authority from the consignee to receive the goods for him is made at the risk of the carrier.[50] So, it has been held that where goods are directed to the consignee the carrier is not discharged from liability by delivering them to the general agent of the consignee at the place of destination,[51] even though the consignee can not be found at that place.[52] And a like decision has recently been made by

cago &c. R. Co., 42 Nebr. 379, 60 N. W. 583; Idaho, The, 93 U. S. 575, 23 L. ed. 978; Chicago Packing &c. Co. v. Savannah &c. R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367; Lake Shore &c. R. Co. v. National &c. Co., 178 Ill. 506, 53 N. E. 326; Anchor Mill Co. v. Railroad Co., 102 Iowa 262, 71 N. W. 255. But a mere invoice is not proof of title and does not justify delivery contrary to the bill of lading. Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626; Dows v. Milwaukee Bank, 91 U. S. 618, 23 L. ed. 214. And marks on goods do not control bill of lading. Rome R. Co. v. Sullivan &c. Co., 25 Ga. 228. We have elsewhere considered the effect of the Federal Bill of Lading Act, (Act Aug. 29, 1916, ch. 415, 39 Stat. 538, et seq.). See chapter on Bills of Lading; also Quality Shingle Co. v. Old Oregon &c. Lumber &c. Co., 110 Wash. 60, 187 Pac. 705.

[49] See Angle v. Mississippi &c. R., 18 Iowa 555; Schlesinger & Sons v. Railroad Co., 85 N. Y. S. 372; Bennett v. Express Co., 12 Ore. 49, 6 Pac. 160; last preceding section, n. 45.

[50] Alabama &c. R. Co. v. Kidd, 35 Ala. 209; Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Williams v. Holland, 22 How. Pr. (N. Y.) 137; Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211 and note; Dean v. Vaccaro, 39 Tenn. 488, 75 Am. Dec. 744; Hermann v. Goodrich, 21 Wis. 536, 94 Am. Dec. 562. See also Angle v. Mississippi &c. R. Co., 18 Iowa 555; Adams v. Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Waldron v. Chicago &c. R. Co., 1 Dak. 351, 46 N. W. 456; American Exp. Co. v. Greenhalgh, 80 Ill. 68; Stowe v. United States Exp. Co., 179 Mich. 349, 146 N. W. 158 (citing text); Nebenzahl v. Fargo, 15 Daly (N. Y.) 130.

[51] Ela v. American &c. Exp. Co., 29 Wis. 611, 9 Am. Rep. 619.

[52] Wilson Sewing Mach. Co. v. Louisville &c. R. Co., 71 Mo. 203. But compare Adams Exp. Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; American Exp. Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691; Whitbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23.

another court where peaches were left at the house of the consignee's wife from whom the consignee was separated, although he was out of the city and did not return until after the fruit had spoiled.[53] But, on the other hand, it was held in a comparatively recent case, that notice to a drayman who was accustomed to receive the consignee's goods was sufficient notice of their arrival where the consignee was out of town and could not be notified in person.[54] So, it is said that no greater proof of the authority of the person to whom they are delivered is required than in any other case,[55] and a delivery to one who has been accustomed to receive goods for the shipper and consignee has been held sufficient.[56] So, although it is ordinarily the duty of an express company to make delivery to the consignee in person at his place of business or residence, or to some person authorized by him to receive it, it has been held that the liability as carrier ceases where delivery is made at the express office or wareroom where such is the established custom and notice is duly given.[57]

[53] Stowe v. United States Exp. Co., 179 Mich. 349, 146 N. W. 158 (citing text).

[54] Burdett v. Canadian Pac. R. Co., 10 Manitoba R. 5.

[55] Wilcox v. Chicago &c. R. Co., 24 Minn. 269. See also Wright &c. Co. v. Warren, 177 Mass. 283, 58 N. E. 1082; Brunswick &c. R. Co. v. Rothschild, 119 Ga. 604, 46 S. E. 829.

[56] Ontario Bank v. New Jersey Steamboat Co., 59 N. Y. 510. In this case the bill of lading stated that the property was addressed to order of the shipper at New York and deliverable at Coentie's Slip, with instructions to "advise" the person to whom they were there delivered. It also appeared that such person, who was a commission merchant, had received goods shipped in the same way as agent or correspondent of the shipper in many previous instances without objection on the part of the shipper. So, it has been held that the agent of the company is also made the agent of the consignee and if the goods are consigned in care of such agent a delivery to him will be sufficient, although it would be otherwise if the goods were consigned directly to such agent and the carrier knew he was not the real owner and had no authority to receive them for the real owner or consignee. Bennett v. Northern Pac. Express Co., 12 Ore. 49, 6 Pac. 160.

[57] Hutchinson v. United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393n. As to duty of carrier to deliver, and to whom, under federal Uniform Bill of Lading Act, see Act. Aug. 29, 1916, ch. 415, 39 Stat. 539, 540; Barnes' Fed. Code §§ 7985-7989, et

§ 2293 (1524a.) Delivery where goods are shipped "in care of" another.—Where goods are shipped to the consignee "in care of" another person it is usually a sufficient delivery to hand the goods over to such third person;[58] but not to the exclusion of the true consignee where delivery can be made to him and he demands the goods.[59] It has been held that the fact of the shipment of the goods in care of the carrier's agent at destination, does not cause the carrier's liability to terminate by delivery of the goods to the station agent at destination. This would seem a proper rule in jurisdictions where the carrier's liability does not terminate until the consignee is notified of their arrival. In a case of this character one court has said: "There is no probable reason why the person sending the package should be supposed to choose to terminate the carrier's responsibility and substitute that of the carrier's agent, when by such a change no duty would be created; the package would be dealt with in

seq. Delivery to another carrier for further carriage may be sufficient in a proper case. Pere Marquette Ry. Co. v. J. F. French Co., (U. S.) 41 Sup. Ct. 195, 197, citing Brecht v. San Antonio Ry. Co., (U. S.) 41 Sup. Ct. 150, and other cases.

[58] Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 N. E. 420, 131 Am. St. 416; Ela v. American Merchants' &c. Exp. Co., 29 Wis. 611; Russell v. Livingston, 16 N. Y. 513; Bell v. Windsor &c. R. Co., 24 N. S. 521.

[59] United States Exp. Co. v. Hammer, 21 Ind. App. 186, 51 N. E. 953. In this case the person in whose care the package was sent refused to receive it. In Southern Ry. Co. v. Hodgson Bros. Co., 148 Ga. 851, 98 S. E. 541, it is held that a carrier issuing a bill of lading naming the owner as both shipper and consignee, with directions to notify a third person unless otherwise directed by some holder of the bill of lading properly indorsed, must deliver to the holder of the bill of lading properly indorsed, ized by him to receive the goods, and not to the person to be notified where the bill has never been assigned to him. And it is well settled that a direction in a bill of lading or shipping receipt to notify a certain person of the arrival of goods consigned to the order of the consignor or another does not ordinarily justify the carrier in delivering them to the person to be notified without production of the bill of lading or shipping receipt properly indorsed. Northern Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; Atchison &c. R. Co. v. Schriver, 72 Kans. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056n.

either case by the same person and in the same way.[60] It is thought that the rule would be different in cases where an understanding existed between the shipper and the agent that the latter should take special care of the shipment on its arrival at destination.[61]

§ 2294 (1525.) **Right of carrier to require identification of consignee.**—As the carrier is held so strictly to the performance of its duty to deliver to the right person, it is no more than just that it should be allowed to require reasonable identification of the consignee where that appears to be necessary in order to protect itself. Indeed, it is its duty as well as its right, in case of doubt, to require proper identification.[62] A reasonable delay in the delivery of the goods in such a case for that purpose is, therefore, unobjectionable and the consignee can not complain, especially when he has no bill of lading or there are other suspicious circumstances. It is generally for the jury to determine whether the delay and the requirements of the carrier as to identification are reasonable or not.[63] The carrier can not, of course, lawfully insist upon unreasonable requirements or take advantage of this rule to cover up its own defaults.[64]

[60] Russell v. Livingston, 16 N. Y. 513.

[61] Fitzsimmons v. Southern Exp. Co., 40 Ga. 330.

[62] McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; American Exp. Co. v. Fletcher, 25 Ind. 492; Gulf &c. R. Co. v. Freeman, 4 Tex. App. (Civil Cas.) 419, 16 S. W. 109 (carrier not liable for refusal to deliver to unidentified consignee who produces no bill of lading, even though he offers to give security). See also Sellers v. Savannah &c. R. Co., 123 Ga. 386, 51 S. E. 398; Wells Fargo & Co. v. Windham, 1 Tex. Civ. App. 267, 21 S. W. 402.

[63] Baltimore &c. R. Co. v. Humphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; Mery v. Chicago &c. R. Co., 86 Minn. 33, 90 N. W. 7; Watt v. Porter, 2 Mason (U. S. C. C.) 77; McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511; Alexander v. Southey, 5 B. & Ald. 247. See also Sargent v. Gile, 8 N. H. 325; Dent v. Chiles, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350; Merz v. Chicago &c. R. Co., 86 Minn. 33, 90 N. W. 7; Moore v. Baltimore &c. R. Co., 103 Va. 189, 48 S. E. 887.

[64] See United States Exp. Co. v. Hammer, 21 Ind. App. 186, 51 N. E. 953; Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585,

§ 2295 (1526.) **Misdelivery—Carrier liable.**—The effect of a misdelivery of goods is in general the same as a total failure to deliver them at all and is deemed a conversion of the property by the carrier.[65] No demand is necessary in such a case,[66] but if there is simply a refusal to deliver because of non-payment of freight, or the like, and no misdelivery, a demand must usually be made before trover will lie.[67] Leaving goods at the wrong place may constitute a misdelivery and conversion of them as

105 Am. St. 108; Clegg v. Southern &c. R. Co., 135 N. Car. 148, 47 S. E. 667, 65 L. R. A. 717; National &c. Co. v. Delaware &c. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. 825.

[65] Louisville &c. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Newhall v. Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713; St. Louis &c. R. Co. v. Larned, 103 Ill. 293; St. Louis &c. R. Co. v. Rose, 20 Ill. App. 670; Merchants' Dispatch Co. v. Merriam, 111 Ind. 5, 11 N. E. 954; Lake Shore &c. R. Co. v. W. H. McIntyre Co., 60 Ind. App. 191, 108 N. E. 978; Claflin v. Boston &c. R. Co., 7 Allen (Mass.) 341; Bowlin v. Nye, 10 Cush. (Mass.) 416; Hall v. Boston &c. R. Co., 96 Mass. 439, 92 Am. Dec. 783; Forbes v. Fitchburg &c. R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 80 and note; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. 301; Cheshire R. Co. v. Foster, 51 N. H. 490; First Nat. Bank v. Northern R. Co., 58 N. H. 203; Price v. Oswego &c. R. Co., 50 N. Y. 213, 10 Am. Rep. 475; Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365; Devereux v. Barclay, 2 B. & A. 702; Hior v. London &c. R. Co., L. R. 4 Ex. Div. 188, 40 L. T. R. (N. S.) 674. See also Southern Exp. Co. v. Ruth, 183 Ala. 493, 39 So. 538, Ann. Cas. 1915D, 871n and note; O'Donnell v. Canadian Pac. R. Co., 109 Maine 800, 84 Atl. 1002, 50 L. R. A. (N. S.) 1172n. As to liability for misdelivery under federal Uniform Bill of Lading Act, see Act Aug. 29, 1916, ch. 415; 39 Stat. 540; Barnes' Fed. Code § 7987.

[66] Louisville &c. R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; Cleveland &c. R. Co. v. C. A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685, 689 (quoting text); Wiggin v. Boston &c. R. Co., 120 Mass. 201; Schroeder v. Hudson River R. Co., 5 Duer (N. Y.) 55; Fulton v. Lydecker, 41 N. Y. St. 457, 17 N. Y. S. 451; Railroad v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861.

[67] See Michigan &c. R. Co. v. Bivens, 13 Ind. 263; Northern Transp. Co. v. Sellick, 52 Ill. 249; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; Rome R. Co. v. Sullivan, 14 Ga. 277. See also Louisville &c. R. Co. v. Britton, 145 Ala. 654, 39 So. 585; Atlantic Coast Line R. Co. v. McRee, 12 Ga. App. 137, 76 S. E. 1057;

well as delivering them to the wrong person.[68] After the carrier becomes a warehouseman it is liable for a misdelivery only where it is negligent,[69] but so long as it remains liable as a common carrier the general rule, as admitted by all the authorities, is that it must deliver to the right person and that the exercise of even a high degree of care on its part will not excuse a misdelivery. There are, however, cases in which it is difficult to determine whether there has been a misdelivery and cases in which the carrier has been misled by the shipper or consignee or the latter have, by their own acts, enabled a swindler to perpetrate a fraud upon the carrier and thus obtain the goods. When we come to cases of this kind we find conflict among the authorities. Without attempting to review all, or any great number, of them we shall briefly state the facts and rulings in enough of the cases to show what has been held to be a misdelivery and how the rule has been applied to peculiar circumstances by different courts. Delivery to the wrong person upon a forged order or the like has been held a misdelivery for which the carrier is liable.[70] So has a delivery to an imposter of goods ordered by him in a fictitious name.[71] Where goods were con-

Clark v. American Exp. Co., 130 Iowa 254, 106 N. W. 642; Davies v. Texas &c. R. Co., 62 Tex. Civ. App. 599, 133 S. W. 295.

[68] Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; Perkins v. Smith, 1 Wils. 328; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Cleveland &c. R. Co. v. C. A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685, 689 (quoting text).

[69] See Heugh v. Railway Co., L. R. 5 Exch. 50; Bush v. Railroad Co., 3 Mo. App. 62; Oskamp v. Express Co., 61 Ohio St. 341, 56 N. E. 13; Louisville &c. R. Co. v. Fort Wayne &c. Co., 108 Ky. 113, 55 S. W. 918.

[70] New York Cent. &c. R. Co. v. Bank, 195 Fed. 456; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; American &c. Exp. Co. v. Milk, 73 Ill. 224; American Exp. Co. v. Stack, 29 Ind. 27; Powell v. Myers, 26 Wend. (N. Y.) 591; Wernwag v. Philadelphia &c. R. Co., 117 Pa. St. 46, 11 Atl. 868; Sword v. Young, 89 Tenn. 126, 14 S. W. 481, 604; Houston &c. R. Co v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Gosling v. Higgins, 1 Camp. 451; Lubbock v. Inglis, 1 Stark. 83. But see Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

[71] Southern Exp. Co. v. Ruth, 183 Ala. 493, 59 So. 538, Ann. Cas. 1915D, 871 and note; Pacific Exp. Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177 and note, 52 Am. St. 324; American Exp. Co.

signed to "E. Kline," at Louisville, but the wrong street was named in stating his address it was held that delivery to "I. Kling" at such address was a misdelivery for which the carrier was liable.[72] So, where the carrier was informed and knew that the goods were the property of the shipper it was held that it was liable for delivering them to a third person at the place of shipment upon the order of the consignee.[73]

§ 2296 (1526a.) **Misdelivery—When not.**—On the other hand, it has been held that where goods are ordered in a fictitious name with intent to defraud the shipper and the carrier is directed to send them to a certain address and there deliver them to such person it is not liable for so doing although the shipper was imposed on by such person.[74] So, where there are two persons of the same name in the same city, and one of them, being a swindler, induces the shipper to sell goods to him in the belief that he is the other, who is a reputable merchant, it is held that the carrier is not liable for delivering the goods to the swindler to whom they are directed.[75] A similar decision was

v. Fletcher, 25 Ind. 492; Price v. Oswego &c. R. Co., 50 N. Y. 213, 10 Am. Rep. 475 (an extreme case); Sword v. Young, 89 Tenn. 126, 14 S. W. 481, 604; Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365. See ante, § 2291. In most of such cases, however, the carrier was negligent in not requiring any identification, in delivering the goods when it ought to have known that there was no such person or firm at the place of delivery, or the like.

[72] McCulloch v. McDonald, 91 Ind. 240.

[73] Southern Exp. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285. See also Wright v. Northern Cent. R. Co., 8 Phila. (Pa.) 19; Atlanta &c. R. Co. v. Howard Supply Co., 125 Ga. 478, 54 S. E. 530; Jefferson R. Co. v. White, 6 Bush (Ky.) 251; Kommel v. Champlain Transp. Co., 93 Vt. 1, 105 Atl. 253, 2 A. L. R. 275 and note. Compare also Babbett v. Grand Trunk &c. Ry. Co., 285 Ill. 267, 120 N. E. 803; Turnbull v. Michigan Cent. Ry. Co., 183 Mich. 213, 150 N. W. 132; Judson v. Minneapolis &c. Ry. Co., 131 Minn. 5, 154 N. W. 506.

[74] McKean v. McIvor, L. R. 6 Exch. 36. See also Fulton Bag &c. Mills v. Hudson Nav. Co., 157 Fed. 987, affirmed in 164 Fed. 1022.

[75] Wilson v. Adams Exp. Co., 27 Mo. App. 360; Drew, The, 15 Fed. 826; Fulton Bag &c. Mills v. Hudson Nav. Co., 157 Fed. 987, affirmed in 164 Fed. 1022; Edmunds v. Merchants' Disp. Transp. Co., 135 Mass. 283, 16 Am. & Eng. R. Cas. 250.

rendered where the swindler assumed the name of a reputable merchant and the goods were sold and shipped to him in that name at the address which he gave, the carrier being free from negligence and the swindler receipting for the goods in his assumed name.[76] So, where goods were sold to a swindler under a different name and shipped to him in his assumed name it was held that, as there was no one else in the place who bore the name which he had assumed and as he was the person to whom they had been sold and were shipped, the company was not liable for delivering the goods to him although he was known to the delivery clerk under a different name and pretended that he was acting as agent for such fictitious person.[77] It is difficult to tell just what limitations or exceptions, if any, there are to the general rule requiring the carrier at all events to deliver to the right person, but we think that if the misdelivery is caused by misdirection or other negligence on the part of the shipper, or if fraud is perpetrated upon him by a third person in such a manner that he really parts with the title to the goods to such third person the carrier, rightfully acting on the faith of appearances which the owner himself has created and in accordance with his directions, and without negligence, ought not to be held liable to him for delivering the goods to such third person, although the owner was imposed on by him.[78]

[76] Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467. See also Heugh v. London &c. R. Co., L. R. 5 Exch. 50. But compare Oskamp v. Express Co., 61 Ohio St. 341, 56 N. E. 13.

[77] Dunbar v. Boston &c. R. Co., 110 Mass. 26, 14 Am. Rep. 576.

[78] See Southern Exp. Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Huntress, The, 2 Ware (U. S.) 89; Ten Eyck v. Harris, 47 Ill. 268; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Dobbin v. Michigan &c. R. Co., 56 Mich. 522, 23 N. W. 204; Bush v. St. Louis &c. R. Co., 3 Mo. App. 62; Wilson v. Adams Exp. Co., 27 Mo. App. 360; Schwarzchild &c. Co. v. Savannah &c. R. Co., 76 Mo. App. 623; Short &c. R. Co. v. Hodapp, 83 Pa. St. 22; Carroll v. Express Co., 37 S. Car. 452, 16 S. E. 128; Congar v. Chicago &c. R. Co., 24 Wis. 157, 1 Am. Rep. 164. See also ante, §§ 2139, 2291; Southern Exp. Co. v. Ruth, 183 Ala. 493, 59 So. 538, Ann. Cas. 1915D, 871, 874 (quoting text but distinguishing the case); May Dept. Stores Co. v. Louisville &c. R. Co., 177 Mo. App. 693, 160 S. W. 527 (consignor negligent); Oskamp v. Southern Exp. Co., 61 Ohio St. 341, 56 N. E. 13; Pacific

§ 2297 (1527.) When liability as carrier terminates—New Hampshire rule and Massachusetts rule conflicting.—Attention has already been directed to the diversity of opinion upon the question as to the time when the liability of the railroad company, as a common carrier, ceases and that of a warehouseman attaches, and many of the cases have been cited.[79] The question is one of difficulty. The two great lines of opposing decisions are commonly called respectively the "New Hampshire rule" and the "Massachusetts rule." The New Hampshire rule affirms that the liability of the company does not terminate until the arrival of the goods at the place to which they were shipped and a reasonable time is allowed the consignee in which to remove them,[80] while the Massachusetts rule affirms that the liability of the company as a common carrier terminates when the goods reach their destination and are delivered upon the platform, or other proper place, or placed in a warehouse or otherwise properly

Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795. But compare Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. 324. In Adams Seed Co. v. Chicago &c. R. Co., 181 Iowa 1052, 165 N. W. 367, L. R. A. 1918B, 622, it is held that one who consigns goods to himself at a certain terminal point cannot hold the carrier liable for conversion as for unauthorized delivery in permitting a reconsignment to another terminal where such consignee, with full knowledge of the facts, ratified it.

[79] Ante, §§ 2211, 2212. See also as to initial carrier not being liable after terminal carrier becomes a warehouseman and as to what law applies in interstate shipment. Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. 469; Adams Seed Co. v. Chicago &c. R. Co., 181 Iowa 1052, 165 N. W. 367, L. R. A. 1918B, 622 and note.

[80] Kennedy v. Mobile &c. R. Co., 74 Ala. 430; Columbus &c. R. Co. v. Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404; Bowdon v. Atlantic Coast Line R. Co., 148 Ala. 29, 41 So. 294, note in 97 Am. St. 91; Missouri Pac. R. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Missouri Pac. Ry. Co. v. Newberger, 67 Kans. 846, 73 Pac. 57; Lewis v. Louisville &c. Ry. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938n, 940, 21 Ann. Cas. 527 (citing text); United Fruit Co. v. New York &c. Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240n, 10 Ann. Cas. 437; Moses v. Boston &c. R. Co., 32 N. H. 523, 64 Am. Dec. 381; Poythress v. Durham &c. R. Co., 148 N. Car. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427n; Knight v. South-

stored by the company.[81] We are inclined to think, although it is with hesitation that we venture to express an opinion, that the true rule is that the liability of the company as a common carrier does not end until the consignee has had reasonable time after the arrival of the goods at their place of destination to remove them, but that this rule is a general one broken by well-marked exceptions. It can not be justly affirmed that a consignee is bound at all times to be at the station to receive the goods, inasmuch as it is a matter of common knowledge and, therefore, a matter judicially known to the courts, that freight trains because of a press of business, accidents and other causes do not always reach the station at the time fixed by the schedule, so that it can not be justly said that he is in fault for not being at the station, nor can it justly be said that the railroad company can expect him to be there. There is, it is obvious, an essential difference between railroad carriers who are provided with depots or warehouses and carriers who are not so provided and do not assume to possess such facilities. The railroad company from the time there is an effective delivery of the goods to it for transportation has entire charge and control of them, and neither the consignor nor the consignee can watch the movement of the goods nor directly control their movement by the carrier, neither can either of them know precisely when the transit has ended, but this the railroad company in contemplation of law, and in fact, does know. So, too, the railroad carrier is, as a rule, in a position to care for the goods, or should be in such position, while the consignee can not ordinarily (there may be, and, doubtless,

ern Ry., 85 S. Car. 78, 67 S. E. 16; Berry v. West Virginia &c. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781; Backhaus v. Railway Co., 92 Wis. 393, 66 N. W. 400; ante, § 2211.

[81] Thomas v. Boston &c. R. Co., 51 Mass. 472, 43 Am. Dec. 444; Norway &c. Co. v. Boston &c. R. Co., 67 Mass. 263, 61 Am. Dec. 423; ante, § 2212. See also Columbus &c. R. Co. v. Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404; Kight v. Wrightsville &c. R. Co., 127 Ga. 204, 56 S. E. 363; Gregg v. Railroad, 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Illinois &c. R. Co. v. Carter, 165 Ill. 570, 36 L. R. A. 527; Schumacher v. Railroad Co., 207 Ill. 199, 69 N. E. 825; Bausmer v. Toledo &c. R. Co., 25 Ind. 434, 87 Am. Dec. 367; Chicago &c. R. Co. v. Reyman, 166 Ind. 278, 73 N. E. 587; Hicks v.

are exceptional instances), be assumed to be prepared to receive the goods immediately on their arrival at the place of destination. It is, therefore, just to hold that the company is not relieved from liability as a common carrier of goods until a reasonable time after their arrival at the place of destination has elapsed. The Massachusetts rule has been commended for the merit of being practicable and easy of application, but, with profound respect for the great judge by whom the rule was formulated, we think the fact that a rule is practicable and easy of application is not sufficient to outweigh the considerations of justice and public policy which undergird the doctrine that there must be a reasonable time for removal after the goods arrive at their destination. In view of the considerations which we have outlined it seems to us that a railroad company receiving goods for transportation impliedly undertakes that it will retain the goods in its capacity of a common carrier for such a reasonable length of time as will enable the consignee to remove them, but that the consignee must exercise reasonable care and diligence in removing them; otherwise the company will be liable as a warehouseman and not as a common carrier, that is, it ceases to be an insurer and is liable only in the event that the loss of the goods is caused by its negligence. The general rule, as we have said, must be subject to important exceptions. One of these exceptions is that where the consignee is at the station when the goods arrive, knows of their arrival, has opportunity to remove them and declines to do so he can not insist that the company be held as a common carrier; he can not, indeed, insist that it be held even as a warehouseman if he is informed that the com-

Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235n; Herf &c. Co. v. Lackawanna R. Co., 100 Mo. App. 164, 73 S. W. 346; Lake Erie &c. R. Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042; Spears v. Spartanburg &c. R. Co., 11 S. Car. 158; East Tenn. &c. R. Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. 902; note in 97 Am. St. 90. In Alabama, California and one or two other states the Massachusetts rule originally seemed to obtain, but has since been changed, in most instances, by statute. As to when the carrier must unload, see Porter v. Chicago &c. R. Co., 20 Ill. 407, 71 Am. Dec. 286; Chicago &c. R. Co. v. Bensley, 69 Ill. 630; Rice v. Boston &c. R. Co., 98 Mass. 212. There may also be cases where notice is required

pany can not store the goods.[82] So, when the goods are shipped to a place where, as the shipper knows, there are no station buildings or warehouses, it has been held that the liability of the carrier terminates as soon as the goods are unloaded, or if left on the cars, are placed in a position ready for immediate delivery to the consignee.[83] We do not believe that it can be justly said that a railroad company is under an absolute duty to provide buildings for storing goods at all places where its freight trains stop, as, for example, an isolated rural stopping place where goods are very seldom received or discharged, and that a consignee has no right to assume that goods will be stored at such places.

§ 2298 (1527a.) Third view—Notice required.—It is usually said that there are two lines of decisions, those we have discussed, but there is in fact a third line composed of the cases which affirm that it is the duty of the railroad company to give notice of the arrival of the goods.[84] These cases, in effect, add to the rule

as where goods are delayed and arrive out of time. See next following section.

[82] Smith v. Nashua &c. R. Co., 27 N. H. 86, 59 Am. Dec. 364. See also Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Pinney v. Railroad Co., 19 Minn. 251; Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

[83] McMasters v. Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264; South &c. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749.

[84] Greek-American Produce Co. v. Illinois Cent. R. Co., 4 Ala. App. 377, 58 So. 994 (by statute); Missouri Pac. R. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. 208; Derosia v. Winona &c. R. Co., 18 Minn. 133; Pinney v. First Division of St. Paul &c. R. Co., 19 Minn. 251; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505. 4 Am. Rep. 709; Hedges v. Hudson River R. Co., 49 N. Y. 223; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Pelton v. Rensselaer &c. R. Co., 54 N. Y. 214, 13 Am. Rep. 568; Gleadell v. Thompson, 56 N. Y. 194; Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; McKinny v. Jewett, 90 N. Y. 267; Tarbell v. Royal Exchange &c. Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. 350; Bobzein v. New York Cent. R. Co., 187 App. Div. 767, 176 N. Y. S. 407; Poythress v. Durham &c. R. Co., 148 N. Car. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427n and note on p. 429; Lake Erie &c. R. Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042. See Chicago &c. R. Co. v. Scott, 42 Ill. 132; Collins v. Alabama &c. R. Co., 104 Ala. 390, 16 So. 140 (statute); Wilson v. California &c. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685 (by statute); Michigan &c. R. Co. v. Ward,

that reasonable time must be given the consignee in which to remove the goods, another duty, namely, that of giving notice. There is reason for affirming that it is not essential in order to terminate the liability of a railroad company as a common carrier that it should give notice to the consignee of the arrival of the goods,[85] since, as it seems to us when the goods are carried to their destination, there stored and a reasonable time allowed the consignee to remove them, the railroad company has performed the duty imposed upon it as a common carrier, and after it has done these things it holds the goods as a warehouseman

2 Mich. 538; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Buckley v. Great Western &c. R. Co., 18 Mich. 121; Railroad Co. v. Fuqua, 84 Miss. 490, 36 So. 449; Tanner v. Oil Creek &c. R. Co., 53 Pa. St. 411; Railroad Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (statute); Missouri &c. R. Co. v. Haynes, 72 Tex. 175, 10 S. W. 398 (statute); Mitchell v. Lancashire &c. Railway Co., 10 L. R. Q. B. 256. In the recent case of Walters v. Detroit United R. Co., 139 Mich. 303, 102 N. W. 745, it is expressly held that the carrier remains liable as such until the lapse of a reasonable time after he has notified the consignee, and not merely for a reasonable time after placing the goods in its warehouse, notwithstanding the consignee knew the probable date of shipment and arrival. In American &c. Jewelry Co. v. Witherington, 81 Ark. 134, 98 S. W. 695, it was held that the carrier was not liable for failure to give notice where the package was not properly addressed. In the case of North Pennsylvania &c. R. Co. v. Commercial &c. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287, it is said in speaking of a provision of the bill of lading requiring carrier to notify the consignees that: "If they were the consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of the goods at their place of destination." The question as to the duty to give notice in order to terminate the liability of the railroad company as a carrier was not before the court and we do not think the decision in the case referred to can be regarded as authoritative adjudication that there is a duty to give notice or that notice must be given in order to terminate the duty of a railroad company as a common carrier of goods. In the case of Thames, The, 14 Wall. (U. S.) 98, 20 L. ed. 804, language is used which indicates that notice to the consignee is necessary to terminate the liability as a common carrier, but the point was not directly decided.

[85] See ante, §§ 2211, 2212, 2297; also Georgia &c. R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312.

and as such is liable for the loss of the goods where the loss is caused by its negligence or that of its employes. In other words, is still under a duty but is not an insurer. The general rule is that the duty of diligence and care is a reciprocal one and it is not easy to perceive why this rule does not make it the duty of the consignee to exercise diligence to ascertain when the goods have arrived and to remove them within a reasonable time after their arrival. There are, however, reasons for the opposite view, and these reasons have been presented in some of the cases we have cited. It is true that the rule requiring a personal delivery of the goods has been abrogated but this is due to a change in the mode of transportation, and it seems to us that of this change the consignee must take notice and do what the change makes necessary, and that one of the consequences of the change is that when the goods have arrived at the place of destination, have been there stored and a reasonable length of time allowed for their removal, the liability of the company as an insurer is at an end. But it is with hesitation that we venture an opinion for we fully recognize the fact that the question is a close one and that able courts have given opinions antagonistic to the rule we incline to favor. Circumstances or custom may make it essential to the termination of the liability of a railroad company that it should give notice to the consignee of the arrival of the goods at the place of destination[86] but as indicated we think that as a matter of law, it can not be said that the termination of liability as a carrier is in all cases dependent upon notice to the consignee of the arrival of the goods. It may be necessary to give notice and make inquiry where the consignee is unknown and claim to the goods is made by a person not known to the carrier,[87]

[86] Southwestern R. Co. v. Felder, 46 Ga. 433 (arrival out of time); Georgia &c. R. Co. v. Pattison, 112 Ga. 468, 37 S. E. 766 (same); Georgia &c. R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312 (custom); Illinois Cent. R. Co. v. Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758 (custom); Herf &c. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346 (custom); Layton & Sons v. Charleston &c. R. Co., 90 S. Car. 323, 72 S. E. 988 (required by bill of lading to notify).

[87] Thames, The, 14 Wall. (U. S.) 98, 20 L. ed. 804. See also Sherman v. Hudson River R. Co., 64 N. Y. 254; Pelton v. Rensselaer &c. R. Co., 54 N. Y. 214, 13 Am. Rep.

but it does not necessarily follow from this that the liability of the company is anything more than that of a warehouseman in cases where it stores the goods and gives the consignee a reasonable time in which to remove them. It is true that the decisions in reference to carriers by water[88] and those in reference to carriers of packages require notice, but it seems to us that those decisions can not be applied to railroad companies, at least in cases where the only question is when their liability as common carriers ends and that of a warehouseman begins. The adjudged cases recognize the force of usage and custom and affirm that custom may require notice or may dispense with notice.[89] Usage and custom, it may be said in passing, are always important factors in controversies involving the rights and duties of railroad carriers.[90] Notice to an agent of the consignee is sufficient

568. But compare Butler v. East Tenn. &c. R. Co., 8 Lea (Tenn.) 32. But, on the other hand, where reasonable effort is made, and he cannot be found, the carrier may usually store the goods and its liability as carrier ceases after a reasonable time. Railroad Co. v. Halch, 52 Ohio St. 408, 39 N. E. 1042, 28 L. R. A. 409; McGregor v. Oregon R. &c. Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668. See also St. Louis &c. R. Co. v. Tounes, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572n.

[88] Liverpool &c. Co. v. Snitter, 17 Fed. 695; Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412; De Grau v. Wilson, 17 Fed. 698; Zinn v. New Jersey &c. Co., 49 N. Y. 442, 10 Am. Rep. 402. See Sherman v. Hudson River R. Co., 64 N. Y. 254; Union &c. Co. v. Knapp, 73 Ill. 506.

[89] Richmond &c. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Illinois Cent. R. Co. v. Carter, 62 Ill. App. 618; Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; South Deerfield Onion Storage Co. v. New York &c. R. Co., 222 Mass. 535, 111 N. E. 367; Herf &c. Co. v. Lackawanna R. Co., 100 Mo. App. 164, 73 S. W. 346; Burlington &c. R. Co. v. Arms, 15 Nebr. 69, 17 N. W. 351; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Russell Mfg. Co. v. New Haven &c. Co., 52 N. Y. 657; Railroad Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443. Contra, Gulf &c. R. Co. v. Fuqua, 84 Miss. 490, 36 So. 449 (notice required notwithstanding custom of railroad to contrary).

[90] Stone v. Rice, 58 Ala. 95; Ely v. New Haven Steamboat Co., 53 Barb. (N. Y.) 207; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211 and note; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Russell &c. Co. v. New Haven &c. Co., 50 N. Y. 121; McMasters v. Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep.

in cases where the agent is authorized to act for the consignee, especially if the consignee is absent and can not be found. The proposition stated is, of course, not a debatable one, but the controversy is as whether the person to whom the notice was given was an agent acting within the scope of his authority.[91]

§ 2299 (1528.) **Reasonable time to inspect and remove.**— Where the rule of the jurisdiction in which the case arises requires that reasonable time be given the consignee, after the arrival of the goods, in which to remove them, the question of what is a reasonable time is one of importance. In determining what is a reasonable time, regard must usually be had to the requirements of commerce, to usage and custom,[92] and to the demands of business, for both the carrier and consignee must be deemed to contract and to act with reference to such matters. Their respective rights and duties can not be justly ascertained and determined without giving to such matters due consideration. On the one hand the carrier is chargeable with notice that the

264; Farmers' &c. Bank v. Champlain &c. Co., 16 Vt. 52, 42 Am. Dec. 491 and note. Usage may be shown upon the question of the mode of delivery and kindred questions, and is of much importance in cases of the class referred to. Hooper v. Chicago &c. R. Co., 27 Wis. 81, 9 Am. Rep. 439; Hodgdon v. New York &c. R. Co., 46 Conn. 277, 33 Am. Rep. 21; Crawford v. Clark, 15 Ill. 561; Whitehouse v. Halstead, 90 Ill. 95; Sleade v. Payne, 14 La. Ann. 453; Leonard v. Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667; New Orleans &c. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; McKeon v. See, 4 Rob. (N. Y.) 449; Tierney v. New York &c. R. Co., 76 N. Y. 305; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776; Peel v. Chicago &c. R. Co., 20 Wis. 594, 91 Am. Dec. 446; Gatliffe v. Bourne, 4 Bing. N. C. 314. See generally as to the effect of usage or custom in relation to the duties of carriers, Bush & Son's Co. v. Thompson, 65 Fed. 812; Constable v. National &c. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. ed. 903; Mundy v. Louisville &c. R. Co., 67 Fed. 633; Weyand v. Atchison &c. R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. 504; Goode v. Chicago &c. R. Co., 92 Iowa 371, 60 N. W. 631; Pennsylvania R. Co. v. Stern, 11[1] Pa. St. 24, 12 Atl. 756, 4 Am. St. 626.

[91] Ante, § 2292; Burdett v. Canadian &c. R. Co., 10 Manitoba 5; Collins v. Alabama &c. R. Co., 104 Ala. 390, 16 So. 140.

[92] Ante, § 2297.

affairs of commerce and business require that it keep the goods for the consignee for such a time as will enable him to remove them,[93] while, on the other hand, the consignee is bound to know that the course of business and the requirements of commerce impose upon him the duty of exercising diligence in removing the goods. The duty of the railroad carrier being a public one a consignee can not, by want of care or diligence, hinder or embarrass it in the performance of that duty. There are cases in which the question whether a reasonable time has been allowed in which to remove the goods is a question of fact, but in many, perhaps in most, instances, where the facts are undisputed, it must be, it seems to us, a question of law[94] inasmuch as matters of which the courts take judicial notice enter so largely into it. We think it may be safely said that the general rule is that where the facts are undisputed and but one reasonable inference can be drawn from them, or, perhaps, where the controversy is controlled by custom and usage, or depends upon facts of which the court takes judicial knowledge, the question is one of law, but in other cases it is one of fact.[95] It has been said that "what is meant by a reasonable time is such as would give a person residing at the place to which the goods are consigned, and informed of the usual course of business on the part of the company, a suitable opportunity within business hours after the goods are ready for delivery, to come to the place of delivery,

[93] But it is held that the fact that the consignee's residence or place of business is at a distance from the depot, or that he is unable to secure draymen at the time, or the like, will not extend the time. Columbus &c. R. Co. v. Ludden, 89 Ala. 612, 7 So. 471; Chalk v. Charlotte &c. R. Co., 85 N. Car. 423. See as to the effect of removing part of the goods, Stapleton v. Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739; Welch v. Concord R., 68 N. H. 206, 44 Atl. 304; Scheu v. Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. 426.

[94] Elliott's Gen. Prac. § 442, n. 2; Tallahassee &c. Co. v. Western R. Co., 128 Ala. 167, 29 So. 203.

[95] Steamer Kathleen Mary, The, 8 Ben. (U. S.) 165; Collins v. Alabama &c. R. Co., 104 Ala. 390, 16 So. 140, 61 Am. & Eng. R. Cas. 229; Denver &c. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578, 97 Am. St. 76; Jeffersonville &c. R. Co. v. Cleveland, 2 Bush. (Ky.) 468; Maignan v. New Orleans &c. R. Co., 24 La. Ann. 333; Buckley v. Great Western &c. R. Co., 18 Mich. 121; Derosia v. Winona &c. R. Co., 18 Minn. 133; Roth v. Buffalo &c.

inspect the goods and take them away."[96] The definition we have quoted, while in the main an accurate one, is not free from objections. It can not be justly said that the person to whom the goods are consigned must necessarily be informed of the company's usual course of business, for knowing himself to be consignee he must, as we conceive, exercise reasonable care and diligence in removing the goods, whether informed as to the company's usual course of business or not, although such information, if he possessed it, would exercise an important influence upon the question of whether a reasonable time in which to remove the goods had elapsed.[97] It is held in many of the cases that the consignee must have a reasonable opportunity to inspect the goods.[98] Some of the cases hold that the carrier may permit the consignee to take away the goods for the purpose of inspection, but, of course, when the goods are removed by the consignee and are rightfully in his possession, there is no liability on the part of the carrier.

R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Fenner v. Buffalo &c. R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Hedges v. Hudson River R. Co., 49 N. Y. 223; Faulkner v. Hart, 82 N.Y. 413, 37 Am. Rep. 574; Poythress v. Durham &c. R. Co., 148 N. Car. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427n; Normile v. Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271 (held one of law where material facts undisputed, citing Hedges v. Hudson River R. Co., 49 N. Y. 223); Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773; Parker v. Milwaukee &c. R. Co., 30 Wis. 689; Lemke v. Chicago &c. R. Co., 39 Wis. 449.

[96] Pinney v. First Division of St. Paul &c. R. Co., 19 Minn. 251. See also United Fruit Co. v. New York &c. Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240n, 247, 10 Ann. Cas. 437.

[97] See Lewis v. Louisville &c. R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938n, 942, 21 Ann. Cas. 527. For what has been held a reasonable time and what has been held not to be, see numerous cases, collected and reviewed in notes in 8 L. R. A. (N. S.) 240; in 16 L. R. A. (N. S.) 935, and in 25 L. R. A. (N. S.) 938.

[98] American Express Co. v. Lesem, 39 Ill. 312; Meyer v. Lemcke, 31 Ind. 208; Old Colony &c. Co. v. Wilder, 137 Mass. 536; Murray v. Warner, 55 N. H. 546, 20 Am. Rep. 227; Union &c. Co. v. Riegel, 73 Pa. St. 72; Berger &c. Co. v. Chicago &c. R. Co., 159 Wis. 256, 150 N. W. 496, 501 (citing text); Great Western &c. R. Co. v. Crouch, 3 Hurlst. & N. 183. See also Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189; Brand v. Weir, 27 Misc. 212, 57 N. Y. S. 731; Sloan v. Carolina &c. R. Co., 126 N. Car. 487, 36 S. E. 21.

It is barely necessary to suggest that if there is no right to permit the goods to be taken by the consignee, and loss is caused the consignor by the wrong of the railroad carrier in suffering the consignee to obtain possession of the goods, it will be liable to the consignor. We doubt whether it can be justly held that the consignee, as against the carrier, can rightfully insist upon permission to make a minute inspection, and we think that when the term "inspect" or the term "inspection" is used by the courts, it means no more than that the consignee shall have a right, if he demands it, to make a general examination of the goods. The decisions which declare and enforce the right of inspection where goods are shipped "C. O. D.," can not, in all their scope at least, apply in other cases.[99]

§ 2300 (1529.) **Rule where goods are to be held until called for.**—The rules which determine the duty of the carrier in regard to the delivery of goods in the absence of any specific contract upon the subject may, of course, be inapplicable where there is an express contract. Thus, it is sometimes provided that the goods shall be held until called for. This does not bind the carrier to keep them forever, but it is bound to hold them for a reasonable time, and after the expiration of a reasonable time for the consignee to call for and receive them it is held that the liability of the carrier as such is terminated.[1] So, if the carrier has agreed to keep the goods for a certain time it may, at the expiration of such time, deliver them to a warehouseman for the owner, and such warehouseman will not be deemed to be the agent of the carrier so as to render it liable for his negligence.[2]

§ 2301 (1530.) **Rule where goods are not to be delivered until paid for.**—A common carrier is not obliged to collect or require the payment of the purchase price of goods offered to it for transportation before delivering them to the purchaser, as one of its common-law duties; but where it expressly agrees to do so, or accepts a consignment of goods with instructions not to deliver

[99] See Lake Shore &c. R. Co. v. W. H. McIntyre Co., 60 Ind. App. 191, 108 N. E. 978.

[1] Chapman v. Great Western &c. R. Co., 42 L. T. R. N. S. 252.

[2] Bickford v. Metropolitan &c. Co., 109 Mass. 151.

them until paid for, it becomes the agent of the consignor to collect the money and is liable if it delivers the goods without doing so.[3] The undertaking may be either express or implied. Thus, it has been held that where it receives goods "C. O. D." and so bills them, it is its duty to collect on delivery and return the charges to the consignor, especially where it is shown to be the custom to do so when goods are so marked.[4] But such an undertaking is not always implied from the mere acceptance of goods so marked, without anything in the bill of lading or receipt to show it.[5] So, where the carrier accepted the consignee's check in payment and sent it to the consignor, it was held that the unconditional acceptance of it by the consignor, without objection, was a waiver of collection in money and a ratification of the carrier's act, and that he could not recover in an action against the carrier.[6] A reasonable time should be allowed the purchaser to inspect the goods and make the payment, and the carrier can not be held liable on account of its compliance with this rule.[7] After tender of the

[3] Cox v. Columbus &c. R. Co., 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 111 and note; Meyer v. Lemcke, 31 Ind. 208; Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749, Ann. Cas. 1916B, 1217n; Old Colony R. Co. v. Wilder, 137 Mass. 536; Jellett v. St. Paul &c. R. Co., 30 Minn. 265, 15 N. W. 237, 16 Am. & Eng. R. Cas. 246. See also Union &c. R. Co. v. Riegel, 73 Pa. St. 72 (to effect that contract may be verbal).

[4] United States Exp. Co. v. Keefer, 59 Ind. 263; Cox v. Columbus &c. R. Co., 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 111 and note; Murray v. Warner, 55 N. H. 546, 20 Am. Rep. 227; American Exp. Co. v. Lesem, 39 Ill. 312.

[5] Chicago &c. R. Co. v. Merrill, 48 Ill. 425; Rennie v. Northern R. Co., 27 U. C. C. P. 153. See also Fowler v. Chicago &c. R. Co., 98 Mo. App. 210, 71 S. W. 1077; Smith v. Express Co., 104 Ala. 387, 16 So. 62. It has also been held that a local station agent has no authority to make such an agreement and render the company liable for its performance. Cox v. Columbus &c. R. Co., 91 Ala. 392, 8 So. 824. And certainly not to guarantee payment of the price of the goods to the shipper Weikle v. Minneapolis &c. R. Co., 64 Minn. 296, 66 N. W. 963.

[6] Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321, distinguishing Walker v. Walker, 5 Heisk. (Tenn.) 425.

[7] Avery v. Stewart, 2 Conn. 69, 7 Am. Dec. 240; Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189; Herrick v. Gallagher, 60 Barb. (N. Y.) 566; Aaron v. Adams Exp. Co., 27 Weekly L. Bull. 183; Great West

goods and refusal to accept them the carrier is usually liable only as warehouseman.[8] It may then return them to the consignor or give notice to him and await his instructions.[9] It is also customary to send bills of lading to the shipper's order with drafts attached, and instructions to "notify" the purchaser. This has been held to be a plain indication that the goods are not to be delivered to such person without the production of the bill of lading,[10] and so it has been held that the mere fact that a draft upon the consignee is attached to a bill of lading indicates an intention that the goods are not to be delivered until the draft is paid.[11]

§ 2302 (1531.) Waiver by consignee.—If one to whom goods are shipped voluntarily accepts them without objection when delivered at an improper time or place, or in an improper manner he thereby waives any objections on account of the place, time, or manner, of delivery.[12] So, if they are delivered, at his request,

ern &c. R. Co. v. Crouch, 3 Hurlst. & N. 183; Isherwood v. Whitmore, 11 M. & W. 347.

[8] Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381; Gibson v. American &c. Exp. Co., 1 Hun (N. Y.) 387; Storr v. Crowley, McClell. & Y. 129; Hasse v. American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. 328.

[9] See American Exp. Co. v. Greenhalgh, 80 Ill. 68; Stafsky v. Southern Ry. Co., 143 Ala. 272, 39 So. 132; Byrne v. Fargo, 36 Misc. 543, 73 N. Y. S. 943; Clark v. American Exp. Co., 130 Iowa 254, 106 N. W. 642.

[10] Ante, §§ 2147 and 2293.

[11] Wells v. Oregon &c. R. Co., 32 Fed. 51. See also McEwen v. Jeffersonville &c. R. Co., 33 Ind. 368, 5 Am. Rep. 216; Joslyn v. Grand Trunk R. Co., 51 Vt. 92. See also St. Louis &c. R. Co. v. Allen, 31 Okla. 248, 120 Pac. 1090, 39 L. R. A. (N. S.) 309n and note; 4 Elliott Cont. § 3165; ante § 2150. The text is cited to the effect in Stoddard Lumber Co. v. Oregon &c. R. &c. Co., 84 Ore. 399, 165 Pac. 363, 4 A. L. R. 1275, 1280.

[12] Lewis v. Western R. Co., 11 Metc. (Mass.) 509; Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Jewell v. Grand Trunk R. Co., 55 N. H. 84; Converse v. Boston &c. R. Co., 58 N. H. 521; Sweet v. Barney, 23 N. Y. 335; Cleveland &c. R. Co. v. Sargent, 19 Ohio St. 438; Hill v. Humphreys, 5 Watts & S. (Pa.) 123, 39 Am. Dec. 117. So held where the goods were delivered to the wrong person and the consignee ratified it O'Dougherty v. Boston &c. R. Co., 1 T. & C. (N. Y.) 477. See also as to unqualified refusal to accept even at proper place. Central &c. R. Co.

or upon his order, at some other place than that to which they were shipped.[13] There may also be a waiver where the owner rightfully resumes control of the goods or knowingly ratifies a wrong delivery.[14] But the mere fact that the consignee accepts a portion of the goods at an improper place will not necessarily operate to release the carrier from its obligation to properly deliver the remainder.[15]

§ 2303 (1532.) **Carrier's right to receipt or surrender of bill of lading.**—Although a railroad company should usually require the production of the bill of lading before it delivers goods to the person demanding them, yet it has been held that it is not entitled under all circumstances to insist upon the surrender and cancellation of the bill of lading as a condition precedent to the delivery of the property.[16] But where the statute prohibits the delivery unless the bill of lading is surrendered and cancelled a delivery to the consignee in violation of the statute will not protect the

v. Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. 58.

[13] London &c. R. Co. v. Bartlett 31 L. J. Exch. 92, 7 H. & N. 400; Strong v. Natally, 4 B. & P. (1 New R.) 16. See also Bruhl v. Southern Exp. Co., 103 Ga. 583, 30 S. E. 269; Dobbin v. Michigan Cent. R. Co., 56 Mich. 522, 23 N. W. 204, 21 Am. & Eng. R. Cas. 85; Sweet v. Barney, 23 N. Y. 335; Hayman v. Canadian Pac. R. Co., 43 Misc. 74, 86 N. Y. S. 728.

[14] Stone v. Waitt, 31 Maine 409, 52 Am. Dec. 621; Dobbin v. Michigan &c. R. Co., 56 Mich. 522, 23 N. W. 204, 21 Am. & Eng. R. Cas. 85; Brasher v. Denver &c. R. Co., 12 Colo. 384, 21 Pac. 44; Reynolds v. New York &c. R. Co., 50 Hun 606, 3 N. Y. S. 331; Converse v. Boston &c. R. Co., 58 N. H. 521. See also Callaway v. Southern R. Co., 126 Ga. 192, 55 S. E. 22; Brown v. Vandalia R. Co., 163 Ill. App. 473; A. W. Burrett Co. v. New York Cent. &c. R. Co., 76 Misc. 520, 135 N. Y. S. 557; Stanchfield Warehouse Co. v. Central R. Co., 67 Ore. 396, 136 Pac. 34. But compare Sanquer v. London &c. R. Co., 16 C. B. 163.

[15] Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145; Home Ins. Co. v. Western Transp. Co., 51 N. Y. 93.

[16] Gulf &c. R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435 (rehearing granted on another ground in 26 S. W. 745); Dwyer v. Gulf &c. R. Co., 69 Tex. 707, 7 S. W. 504; First Nat. Bank v. Antonio &c. R. Co., 97 Tex. 201, 77 S. W. 410. See also Ensign v. Illinois Cent. R. Co., 180 Ill. App. 382; Green v. Baltimore &c. R. Co., 206 Mass. 331, 92 N. E. 622, 19 Ann. Cas. 464.

carrier as against one to whom the bill of lading has been assigned.[17] So, we think it clear that, even if the carrier is not entitled to the surrender and cancellation of the bill of lading, it is entitled, ordinarily to its production or presentation as evidence of the right of the person demanding the goods to receive them, and that it may also require him to give it a receipt upon the delivery of the goods.[18] A carrier may be liable under the federal Uniform Bill of Lading Act for delivery without taking up an order bill, but delivery to the holder of such a bill properly indorsed may be justified, so long as the carrier has no notice of any infirmity of title, regardless of the capacity in which he holds or whether he holds it lawfully or not; and, while delivery to such holder does not exonerate the carrier where it fails to require surrender of the bill as provided in the act and loss results to the shipper or subsequent purchaser, there is no conversion and liability therefor by the carrier for failure to require such surrender where loss does not result therefrom.[18a]

§ 2304 (1533.) Duty to store—Liability as warehouseman.—We have elsewhere treated in a general way of the liability of a railroad carrier in possession of goods in the capacity of a ware-

[17] Colgate v. Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114; Syracuse First Nat. Bank v. New York Cent. &c. R. Co., 85 Hun 160, 32 N. Y. S. 604. But see as to "spent" bill. National &c. Bank v. Lackawanna Transp. Co., 172 N. Y. 596, 64 N. E. 1123, affirming 6 N. Y. S. 396; and compare Mairs v. Baltimore &c. R. Co., 175 N. Y. 409, 67 N. E. 901.

[18] See Bass v. Glover, 63 Ga. 745; Skinner v. Chicago &c. R. Co., 12 Iowa 191. See also Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758; Finn v. Western R. Corp., 102 Mass. 283; Dwyer v. Gulf &c. R. Co., 69 Tex. 707, 7 S. W. 504, 32 Am. & Eng. R. Cas. 461; Security Trust Co. v. Wells, Fargo &c. Co., 178 N. Y. 620, 70 N. E. 1109, affirming 80 N. Y. S. 830. The carrier has a right to demand a receipt if the consignee is given a reasonable opportunity to examine. Skinner v. Chicago &c. R. Co., 12 Iowa 191. But not otherwise as a rule. Christian v. First Div. St. Paul &c. R. Co., 20 Minn. 21. See also chapter on Bills of Lading.

[18a] Pere Marquette Ry. Co. v. J. F. French Co., (U. S.) 41 Sup. Ct. 195. See also Famous Mfg. Co. v. Chicago &c. Ry. Co., 166 Iowa 361, 147 N. W. 754; Nelson Grain Co. v. Ann Arbor R. Co., 174 Mich. 80, 140 N. W. 486.

houseman,[19] and it is not our purpose to repeat what was there said. The general rule is that the duty of a railroad company does not end with the arrival of the goods at the place to which they were shipped, for it is incumbent upon the carrier to exercise reasonable care and diligence to prevent injury to the goods by storing or otherwise protecting them,[20] but when it has performed its duty as a carrier and then warehouses the goods its responsibility is not the extraordinary one which the law imposes upon common carriers.[21] It remains liable, not, however, as a common carrier but as a bailee for hire.[22] The reasoning of the courts

[19] Ante, §§ 2211, 2212.

[20] Captain John, The, 33 Fed. 927; Farmers' &c. Co. v. Oregon &c. R. Co., 73 Fed. 1003; Judd v. New York &c. Co., 117 Fed. 206, 128 Fed. 7; St. Louis &c. R. Co. v. Flannagan, 23 Ill. App. 489; Independence &c. Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Adams &c. Co. v. Cressap, 6 Bush (Ky.) 572; Rice v. Boston &c. R. Co., 98 Mass. 212; Rice v. Hart. 118 Mass. 201, 19 Am. Rep. 433; Bates v. Chicago &c. R. Co., 140 Wis. 235, 122 N. W. 745, 133 Am. St. 1069; Aldridge v. Great Western &c. R. Co., 15 C. B. (N. S.) 582.

[21] Alabama &c. R. Co. v. Grabfelder, 83 Ala. 200, 3 So. 432; Anniston &c. R. Co. v. Ledbetter, 92 Ala. 326, 9 So. 73; Gratiot &c. Warehouse Co. v. St. Louis &c. R. Co., 221 Ill. 418, 77 N. E. 675; Adix v. Chicago &c. R. Co., 150 Iowa 379, 130 N. W. 162; Union &c. R. Co. v. Moyer, 40 Kans. 184, 19 Pac. 639, 10 Am. St. 183; Kansas City &c. R. Co. v. Morrison, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252; Aldrich v. Boston &c. R. Co., 100 Mass. 31, 97 Am. Dec. 74; Arthur v. St. Paul &c. R. Co., 38 Minn. 95, 35 N. W. 719; Gleadell v. Thomson, 56 N. Y. 194; Becker v. Pennsylvania R. Co., 109 App. Div. 230, 96 N. Y. S. 1; Missouri &c. R. Co. v. Haynes, 72 Tex. 175, 10 S. W. 398; Gatliffe v. Bourne, 4 Bing. N. C. 314; ante, §§ 2211, 2212. The effect of part delivery was considered in a recent case and it was held that there was no such a delivery as terminated the duty of the railroad company as a common carrier. Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. As elsewhere shown the rule is that while the goods are stored by a railroad company during transit, and as incident thereof, its liability is that of a common carrier. Railroad Co. v. Manufacturing Co., 16 Wall. (U. S.) 318, 21 L. ed. 297.

[22] Hardman v. Montana Un. R. Co., 83 Fed. 88, 39 L. R. A. 300, and cases already cited in preceding notes. As to when the duty of the company as a common carrier ends is not here considered.

which assert that the company is bound to warehouse is that the circumstances under which the goods came into its possession are such as to imply an undertaking on its part to exercise reasonable care to protect them from injury.[23] We do not think that the cases which hold that payment of charges may be deemed compensation for warehousing are well decided, for the reason that, except where storage is part of the transportation, the company is entitled to compensation for storage. There may, it is obvious, be additional charges where the goods are held a considerable time or where there is a right to demurrage, terminal charges or the like. While it is the general rule that it is the duty of a railroad company to store or warehouse goods the rule is by no means free from exceptions. The goods may be such as can not be stored as, for instance, coal, stone or the like, and in such cases it seems clear to us that there is no duty to warehouse.[24] So the conduct of the consignee may relieve the company from the duty to store. Thus, where the consignee was present when the goods arrived, was notified to take them and was informed that the company could not store them it was held that there was no obligation to warehouse the goods,[25] but if the company was able to store the goods and the consignee was not

[23] Smith v. Nashua &c. R. Co., 27 N. H. 86, 59 Am. Dec. 364. Citing as to the implied duty, Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. Dec. 649. See Deming v. Merchants' &c. Co., 33 Am. L. Reg. 391. As to when it is not liable for theft, see Hutchinson v. United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393n.

[24] The expressions found in some of the books asserting that there is always a duty to warehouse may correctly state the rule as to carriers of packages or the like, but at least unless the term "to warehouse" is given a meaning broad enough to include keeping the property in a car on a side track or the like, they do not correctly state it where the articles carried by a railroad company are such are not capable of being stored or such as are not usually stored. See Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Gratiot &c. Warehouse Co. v. St. Louis &c. R. Co., 221 Ill. 418, 77 N. E. 675; Kirk v. Chicago &c. R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397.

[25] Smith v. Nashua &c. R. Co., 27 N. H. 86, 59 Am. Dec. 364.

prepared to remove them the doctrine of the case cited would probably not apply.[26]

[26] As to when and how the company may sell property to prevent loss, see Alabama &c. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18n; Hasler Co. v. Gruffing &c. Orchard Co., 133 Ill. App. 635; Hull & Co. v. Missouri Pac. R. Co., 60 Mo. App. 593; Rankin v. Memphis &c. R. Co., 9 Heisk. (56 Tenn.) 564, 24 Am. St. 339; Missouri &c. R. Co. v. Cox & Co. (Tex. Civ. App.), 144 S. W. 1196. As to right of carrier to terminate its duty as warehouseman, see note in 9 L. R. A. (N. S.) 577. Dudley v. Chicago &c. R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135n, 112 Am. St. 1027. In some states there are statutes upon the subject which must be complied with.

CHAPTER LXXII

EXCUSES FOR FAILURE TO DELIVER

Sec.
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§ 2310 (1534). **Difference between cases not within the scope of duty and cases involving excuses for non-delivery.**—It is often said that a railroad carrier is excused for a failure to deliver goods when the failure is caused by the vis major, or the act of God, by the act of public enemies, or by public authority, but it seems to us that strict accuracy requires it to be said that the undertaking of a common carrier, unless there is an express contract, does not cover or embrace loss or injury due to such causes, so that where the loss or injury directly results without fault on the part of the carrier from such causes it is not covered or embraced by its undertaking and hence there is no breach of duty, and, for that reason no liability, but, whatever may be the true ground on which the conclusion rests, it is true beyond controversy that a carrier, free from fault, is not liable for a failure to deliver in cases where the failure is attributable to any of the

causes above enumerated. But it is important to remember that where the fault of the railroad carrier concurs in producing the loss or injury it can not avail itself of a defense founded upon any of the causes mentioned, since the negligence of the carrier will be adjudged to be the proximate cause of the loss or injury.[1] The duty of the carrier does not cover injuries resulting from the inherent nature of the goods, improper packing or the fraud of the shipper, although there may be a liability, not, however, as an insurer, but for loss caused by the carrier's negligence.[2] The examples we have given are sufficient to show that there is a difference between the cases where the scope of the carrier's duty is not such as to make it liable for the loss, and cases where there is a duty but a valid excuse for non-delivery. This difference, as we believe, supplies a sound foundation for the cases which affirm that where the carrier shows that the loss was due to one of the causes which the law declares shall exonerate it from liability it need not go further and prove that it was not guilty of negligence.[3] Where, however, the loss is one from which the

[1] Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; Bibb &c. Co. v. Atchinson &c. R. Co., 94 Minn., 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. 361; Grier v. St. Louis &c. R. Co., 108 Mo. App. 565, 84 S. W. 158; Nugent v. Smith, L. R. 1 C. P. D. 19; Robinson v. Dunmore, 2 B. & P. 416; ante, § 2204. See also Alabama &c. R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 8 Ann. Cas. 308; Green-Wheeler Shoe Co. v. Chicago &c. R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45; St. Louis &c. R. Co. v. Dreyfus, 42 Okla. 401, 141 Pac. 773, L. R. A. 1915D, 547n and note; Fentiman v. Atchison &c. R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939. But, as shown in the section above cited and in the Iowa case cited, there is much conflict among the authorities as to whether the Act of God or the like is an excuse where the company's negligence was prior thereto, as in case of delay. Also note in L. R. A. 1916D, 988.

[2] Ante, 2241. See also Currie v. Seaboard &c. R. Co., 156 N. Car. 432, 72 S. E. 493; notes in 29 L. R. A. (N. S.) 1214; L. R. A. 1915C, 1220; and L. R. A. 1915D, 1277.

[3] Hunt v. Propeller Cleveland, The, 6 McLean (U. S.) 76; New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Transportation Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160; Christie v. Creighton, The, 41 Fed. 62; Jones v. Minneapolis &c. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; Armstrong &c. Co. v.

law does not exonerate the carrier or from which the contract does not relieve it, and the defense is founded upon an excuse for non-delivery then we think the burden is usually on the carrier to show the excuse.

§ 2311 (1535). **Excuses for non-delivery arising from acts of the shipper, owner or consignee.**—Where the fault or mistake of the shipper[4] is the cause of the failure to deliver, the carrier is excused unless guilty of negligence.[5] The mistake or negligence of the shipper in marking or directing the goods or in like matters relieves the carrier, since the performance of such acts is no part of the duty imposed by law upon the carrier, but where the carrier knows that a mistake has been made then it is at least under a duty to use reasonable care and diligence to prevent loss or injury from resulting from such mistake.[6] If there is such

Illinois Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671n; St. Louis &c. R. Co. v. Dreyfus, 42 Okla. 401, 141 Pac. 773, L. R. A. 1915D, 547n; ante, § 2276. But compare Central &c. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898n, 110 Am St. 170, 4 Ann. Cas. 128; Chicago &c. R. Co. v. Logan, 23 Okla. 707, 105 Pac. 343, 29 L. R. A. (N. S.) 663n; Ferguson v. Southern Ry., 91 S. Car. 61, 74 S. E. 129. But as shown by the cases last cited and as elsewhere shown there is stubborn conflict upon this question.

[4] Montgomery &c. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483; Cooper v. Georgia &c. R. Co., 92 Ala. 329, 9 So. 159, 25 Am. St. 59; American Standard Jewelry Co. v. Witherington, 81 Ark. 134, 98 S. W. 695; Erie &c. R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Stimson v. Jackson, 58 N. H. 138; Lake Shore &c. R. Co. v. Hodapp, 83 Pa. St. 22; Southern &c. Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Congar v. Chicago &c. R. Co., 24 Wis. 157, 1 Am. Rep. 164; Treleven v. Northern Pac. R. Co., 89 Wis. 598, 62 N. W. 536; ante, §§ 2238-2241. See also St. Louis &c. R. Co. v. Pafe, 100 Ark. 269, 140 S. W. 265; Reed v. Philadelphia &c. R. Co., 3 Houst (Del.) 176; Watkins Merchandise Co. v. Missouri &c. R. Co., 82 Kans. 308, 108 Pac. 116; Chicago &c. R. Co. v. Beatty, 27 Okla. 844, 116 Pac. 171; American Lead Pencil Co. v. Nashville &c. R. Co., 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323; Cohen Bros. v. Missouri &c. R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437.

[5] Mahon v. Blake, 125 Mass. 477; Guillaume v. General Transportation Co., 100 N. Y. 491, 3 N. E. 489; O'Rourke v. Chicago &c. R. Co., 44 Iowa 526. If the loss would not have occurred without the carrier's concurring negligence, it is liable. McCarthy v. Railroad Co., 102 Ala. 193, 14 So. 370, 48 Am. St. 29.

[6] See Atlantic &c. R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A.

a mistake shown, then, it would seem, in one sense at least, that the burden of showing negligence, and that it was the proximate cause of the loss, is upon the shipper or the consignee. The conclusion which we have just stated is not opposed to the rule that proof of loss ordinarily makes a prima facie case, for it implies that the railroad carrier has the burden of showing an excuse for a failure to deliver but affirms that it destroys the prima facie case when it shows that the loss was caused by the negligence, fault or wrong of the shipper or consignee. It is unquestionably the rule, in cases where there are no contract stipulations limiting liability, that where a loss is shown after complete delivery of the goods to the carrier, the presumption is against the carrier,[7] but this presumption is, of course, a rebuttable one and is overcome when it is shown that there was such fault or wrong on the part of the shipper or consignee, and when the presumption is overthrown the plaintiff's case is gone, unless negligence on the part of the carrier is established. There must, of course, be evidence of delivery to the carrier and of loss or the

(N. S.) 1214, Ann. Cas. 1912B, 389n; O'Rourke v. Chicago &c. R. Co., 44 Iowa 526; Mahon v. Blake, 125 Mass. 477; Northwestern Marble &c. Co. v. Williams, 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1077; Weaver v. Southern R. Co., 135 Mo. App. 210, 115 S. W. 500; Guillaume v. Transportation Co., 100 N. Y. 491, 3 N. E. 489. Indeed, the prevailing rule seems to be that if the carrier receives the goods knowing the facts, under which it would have a right to refuse them, it assumes to carry them as they are and the full common law liability as a carrier attaches to the contract of carriage. See Minnesota case above cited and other cases there cited in the opinion.

[7] Montgomery &c. R. Co. v. Moore, 51 Ala. 394; Adams &c. Co. v. Haynes, 42 Ill. 89; Adams &c. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Chicago &c. R. Co. v. Dickinson, 74 Ill. 249; Little v. Boston &c. R. Co., 66 Maine 239; Southern &c. Co. v. Seide, 67 Miss. 609, 7 So. 547; Davidson v. Graham, 2 Ohio St. 131; Whitesides v. Russell, 8 Watts & S. (Pa.) 44; American &c. Co. v. Sands, 55 Pa. St. 140; Rogers v. Head. Cro. Jac. (4 Croke) 262; Ross v. Hill, 2 C. B. 877; Harris v. Costar, 1 C. & P. 636; Dudley v. Smith, 1 Camp. 167; Beauchamp v. Powley, 1 M. & Rob. 38; Cairns v. Robins, 8 M. & W. 258; Campagnie &c. R. Co. v. Fortier (Montreal), L. R. 5 Q. B. 224. But see Canfield v. Baltimore &c. R. Co., 75 N. Y. 144; Hussey v. Saragossa, The, 3 Woods (U. S. C. C.) 380; Laffrey v. Grummond, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. 624. See also **Fentiman**

presumption will not arise.[8] It is clear that where the consignee is not ready or able to receive the goods delivery may be excused, but in such cases there is ordinarily the duty of a warehouseman resting on the railroad company although the extraordinary duty of a common carrier terminates[9] when there is ability and readiness on the part of the company to deliver and inability or refusal on the part of the consignee to receive the goods.[10] We think that where it is the duty of the person insisting upon a delivery to produce the bill of lading and he fails or refuses to do so non-delivery is excused and that the excuse has for its basis the act of the party.[11] It is proper in this connection to direct attention to the rigorous rule against common carriers which prevails in cases where goods are delivered to persons to whom they are consigned under fictitious names, and in some cases where a swindler or an impostor procures the owner to consign goods to him.[12] The rule to which we refer as applied in

v. Atchison &c. R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939; notes in 1 L. R. A. (N. S.) 985; 4 L. R. A. (N. S.) 1060.

[8] Cooper v. Georgia &c. R. Co., 92 Ala. 329, 9 So. 159, 25 Am. St. 59; Tucker v. Cracklin, 2 Stark. 339; Woodbury v. Frink, 14 Ill. 279; Griffiths v. Lee, 1 Car. & P. 110.

[9] Reuben Doud, The, 46 Fed. 800; Cahn v. Michigan &c. R. Co., 71 Ill. 96; Cincinnati &c. R. Co. v. McCool, 26 Ind. 140; Missouri &c. R. Co. v. Jenkins, 35 Tex. Civ. App. 429, 80 S. W. 428. See Independence &c. Co. v. Burlington &c. R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; Mohr v. Chicago &c. R. Co., 40 Iowa 579. As to duty of the company to give notice, see Alabama &c. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18.

[10] We do not at this place enter the field of conflict wherein the cases so stoutly fight over the question whether in order to constitute complete delivery by the carrier, notice must be given the consignee. We simply affirm that where there is ability and readiness to deliver, including therein all acts required to constitute a delivery by the carrier, the failure to deliver is excused by the act of the consignee.

[11] Ante, §§ 2147-2149. See Pennsylvania Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626; Dows v. National &c. Bank of Milwaukee, 91 U. S. 618, 23 L. ed. 214; North &c. R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; Cox v. Columbus &c. R. Co., 91 Ala. 392, 8 So. 824; Louisville &c. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Farmers' &c. Bank v. Logan, 74 N. Y. 568. See also federal Uniform Bill of Lading Act, of Aug. 29, 1916, ch. 415; Barnes' Fed. Code § 7985, et seq.

[12] A striking illustration of the rigor of the rule is supplied by the

some cases trenches upon the rule which protects carriers in cases where the negligence or wrong of the shipper is the cause of the loss, for many of the cases affirm that a railroad carrier must at its peril deliver the goods to the proper person. Some of the cases carry the rule very far, and a failure to deliver is held not to be excused where the delivery is to a person who has assumed a fictitious name or is an impostor or a swindler, and this, according to some of the cases, is so even though the act of the owner may have had an important influence in misleading the carrier, and the carrier may have acted in the utmost good faith.[13] But there are cases affirming, justly as we believe, that acts of the owner, although there may be fraud and imposture, may be such as to excuse the failure to deliver.[14] We do not at this place enter into a discussion of the doctrine of the cases referred to, since our immediate purpose is simply to direct attention to the fact that the rule that the carrier is excused where the failure to deliver is caused by the act of the owner or consignor is not to be extended to all cases wherein it may seem that the act of the owner caused the failure to duly deliver goods.

case of Pacific &c. Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. 324.

[13] Southern &c. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Southern &c. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; American &c. Co. v. Fletcher, 25 Ind. 492; American &c. Co. v. Stack, 29 Ind. 27; McEntee v. New Jersey &c. Co., 45 N. Y. 34, 6 Am. Rep. 28; Price v. Oswego &c. R. Co., 50 N. Y. 213, 10 Am. Rep. 475; Winslow v. Vermont &c. R. Co., 42 Vt. 700, 1 Am. Rep. 365; Meyer v. Chicago &c. R. Co., 24 Wis. 566, 1 Am. Rep. 207; Duff v. Budd, 3 Brod. & B. 177; Stephenson v. Hart, 4 Bing. 476; Ross v. Johnison, 5 Burr. 2825; Brown v. Hodgson, 4 Taunt. 189. See generally Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1; Norwalk Bank v. Adams &c. Co., 4 Blatchf. (U. S.) 455; Houston &c. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Sword v. Young, 89 Tenn. 126, 14 S. W. 481, 604; Angle v. Mississippi &c. R. Co., 18 Iowa 555; Claflin v. Boston R. Co., 7 Allen (Mass.) 341. As to the carrier's liability for fraud of its agent, see Jasper &c. Co. v. Kansas City &c. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. 75.

[14] Dunbar v. Boston &c. R. Co., 110 Mass. 26, 14 Am. Rep. 576; Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467; Edmunds v. Merchants' &c. Transportation Co., 135 Mass. 283; Bush v. St. Louis &c. R. Co., 3 Mo. App. 62; Wilson v. Adams &c. Co., 27 Mo. App. 360; Fisk v. Newton, 1 Denio (N. Y.) 45; Heugh v. London &c. R. Co., L. R. 5 Exch. 50; McKean v. McIvor, L. R. 6 Exch. 36. See ante, § 2295.

§ 2312 (1536). Countermanding original shipping directions —Change of instructions.—Where goods are brought to a common carrier by one who appears to be the owner, and there are no facts or circumstances indicating that he is not the owner, the carrier has a right, and, indeed, is bound to, obey shipping directions or instructions given at the time goods are accepted for transportation,[15] but after the goods have been accepted and the duty of transportation undertaken, the question as to the right to give instructions or directions assumes a different character. Where the shipper is both consignor and consignee, and there are no intervening rights of third persons, the shipper may change directions or instructions, and obedience to the instructions as changed will excuse a failure to deliver when the failure is attributable to the change and there is no negligence on the part of the carrier. The general rule is that where the consignor or shipper has a right to countermand the shipping directions, and does so, due obedience to such countermanding orders will relieve the carrier for a failure to deliver, except in cases where the carrier is guilty of negligence,[16] but it is to be borne in mind that in some instances the shipper can not rightfully countermand shipping directions and thus prevent the goods from reaching the consignee,[17] nor can he do so where a change will impair the rights of third persons who have acquired rights

[15] Ante, § 2239. See also Smith Bros. & Co. v. New Orleans &c. R. Co., 106 La. Ann. 11, 30 So. 265, 54 L. R. A. 923, 87 Am. St. 285; Wichita Poultry Co. v. Southern Pac. Ry. Co., 197 Mo. App. 578, 198 S. W. 82; Texas Cent. R. Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

[16] Ante, § 2152; Scothorn v. South &c. R. Co., 8 Exch. 341. See Lewis v. Galena &c. R. Co., 40 Ill. 281; Straus v. Martha, 35 Fed. 313; Stafsky v. Southern R. Co., 143 Ala. 272, 39 So. 132; Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Atchison &c. R. Co. v. Schriver, 72 Kans. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056; Steidl v. Minneapolis &c. R., 94 Minn. 233, 102 N. W. 701; Chaffe v. Mississippi &c. R. Co., 59 Miss. 182; Sharp v. Clark, 13 Utah 510, 45 Pac. 566.

[17] As the consignee, nothing to the contrary being shown, is presumptively the owner of the goods, and as third persons acting on the faith of acts done by the carrier may acquire right which carrier can not justly impair, it necessarily follows that there are cases in which directions can not be countermanded by the shipper or consignor. Southern &c. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285;

which can not be impaired by a shipper, so that the question as to the right to countermand orders is often one of controlling importance.[18] Where the consignee, if the owner or the person entitled to control the movements of the goods, gives orders countermanding those originally given the carrier is not in fault in obeying them,[19] but, as in the case of the shipper or consignor, the question hinges upon the right of the consignee to give countermanding instructions or directions. As the consignee is ordinarily regarded as the owner, the presumption is, there being no countervailing facts, that he has a right to give such orders.[20]

Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; ante, §§ 2149, 2152. And it is held some evidence of the consignor's right may be required by the carrier, and that it can only be required to comply with a proper demand not materially adding to its burdens. Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758; Ft. Worth &c. R. Co. v. Caruthers (Tex. Civ. App.), 157 S. W. 238. See also Worden v. Canadian Pac. R. Co., 13 Ont. R. 652; Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762 (must be during transit and not after destination reached and carrier's obligation ended); Lake Shore &c. R. Co. v. National Live Stock Bank, 178 Ill. 506, 53 N. E. 326; Hartwell v. Louisville &c. R. Co., 15 Ky. L. 778; Gazelle, The, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496 (and carrier may demand full freight and expenses caused by the change); Gulf &c. R. Co. v. Dennison, 25 Tex. Civ. App. 127, 60 S. W. 281.

[18] See Lester v. Delaware &c. R. Co., 73 Hun 398, 26 N. Y. S. 206; Bailey v. Hudson River R. Co., 49 N. Y. 70; Nelson v. Chicago &c. R. Co., 2 Ill. App. 180; Philadelphia &c. R. Co. v. Wireman, 88 Pa. St. 264.

[19] London &c. R. Co. v. Bartlett, 7 H. & N. 400. See Pollard v. London &c. R. Co., 22 L. T. R. (N. S.) 551. But it is held that where the bill of lading calls for delivery to the shipper with directions to notify the buyer the latter can not change the destination without producing the bill of lading. Perkett v. Manistee &c. R. Co., 175 Mich. 253, 141 N. W. 607.

[20] The consignee, where there is no contract, duty or notice to the contrary, may be treated by the carrier as the owner. Bailey v. Hudson River &c. R. Co., 49 N. Y. 70; Fitzhugh v. Wiman, 9 N. Y. 559; Hotchkiss v. Artizans' Bank, 2 Abb. App. Dec. (N. Y.) 403; London &c. R. v. Bartlett, 7 H. & N. 400. See also Southern Expr. Co. v. Williams, 99 Ga. 482, 27 S. E. 743; Tebbs v. Cleveland &c. R. Co., 20 Ind. App. 192, 50 N. E. 486; Railway Co. v. Frankel Bros. (Can.), 33 S. C. R. 115. But not if the consignor is known by the carrier to be the owner and the goods are merely shipped to the consignee to receive them, at the place designated as his agent. Southern Exp. Co. v. Dickson, 94 U. S. 549, 24 L. ed. 285. See also Louisville &c. R. Co. v. Hartwell, 99 Ky. 436, 36 S.

It is obvious that if the failure to deliver is caused by the directions of a consignee, provided he can rightfully give such orders, the carrier is relieved from liability. But a carrier has been held liable to the consignor for delivering goods to one who purchased the business of the consignee without the knowledge of the consignor or the carrier, notwithstanding he had been an employe of the consignee and was believed to be his agent, and the culpable conduct of the consignee in placing the purchaser in charge of the business without notifying the carrier of the change was held not to estop the consignor.[21]

§ 2313 (1537). Seizure under legal process—Generally.—In discussing the subject of the exoneration of a railroad carrier in cases where the loss is attributable to the exercise of public authority we considered the question of the effect of the seizure of goods under legal process.[22] It is now the general rule, whatever may have been the doctrine of earlier cases, that where the goods are taken from the carrier by a writ issued from a court which appears to possess jurisdiction the failure to deliver is excused.[23] We do not believe that, strictly speaking, the carrier is

W. 183, 38 S. W. 1041; Sawyeer v. Chicago &c. R. Co., 22 Wis. 402, 99 Am. Dec. 49. The carrier may, therefore, usually act upon the orders or directions of the consignee, but can not do so in all cases; as, for instance, where there is fraud on the part of the consignee.

[21] Kommel v. Champlain Transp. Co., 93 Vt. 1, 105 Atl. 253, 2 A. L. R. 275.

[22] Ante, § 2209.

[23] In a note to Kohn v. Richmond &c. R. Co. (37 S. Car.), 34 Am. St. 726, 735, the rule is thus stated by Mr. Freeman: "A common carrier is excused from liability for not carrying and delivering goods when, without any act, fault or connivance on his part they are seized by legal process and taken out of his possession. This proposition is universally admitted and established, no matter by or against whom the process is served, provided it is valid." Wells v. Maine &c. Co., 4 Cliff. (U. S.) 228; Lemont v. New York &c. R. Co., 28 Fed. 920; Savannah &c. R. Co. v. Wilcox, 48 Ga. 432; Ohio &c. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Furman v. Chicago &c. R. Co., 57 Iowa 42, 10 N. W. 272, 62 Iowa 395, 17 N. W. 598, 68 Iowa 219, 26 N. W. 83; French v. Star &c. Co., 134 Mass. 288; Pingree v. Detroit &c. R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; McAlister v. Chicago &c. R. Co., 74 Mo. 351; Bliven v. Hudson River &c. R. Co., 36 N. Y. 403; Jewett v. Olsen, 18 Ore. 419, 17 Am. St. 745;

bound at its peril to ascertain that the process is valid. Our opinion is, that if an officer armed with a writ, which appears fair on its face, and to be issued by a court having jurisdiction of the general subject, duly demands the goods, it is the duty of the carrier to yield possession.[24] We do not believe that the carrier is bound to ascertain whether there was a right to issue the writ,[25] nor to determine whether there is jurisdiction of the persons of the parties.[26] If there is no defect apparent on the face of the writ, nothing to arouse distrust, and there is jurisdiction of the general subject, then, as we believe, all questions as to the right to the writ and its validity, as well as all questions going to the

Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145. See also Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, Ann. Cas. 1916B, 1217n; American Exp. Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525, 15 Ann. Cas. 536. Some of the courts seem to hold, however, that although the carrier gives notice, it is bound to show that the officer had a legal right to seize the goods. Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. 301. See also Nickey v. St. Louis &c. R. Co., 35 Mo. App. 79; Edwards v. White Line Co., 104 Mass. 159, 6 Am. Rep. 213; Savannah &c. Co. v. Wilcox, 48 Ga. 432; Merz v. Railway Co., 86 Minn. 33, 90 N. W. 7.

[24] Stiles v. Davis & Barton, 1 Black (U. S.) 101, 106, 17 L. ed. 33.

[25] As indicated at another place, it has been held that the carrier is excused although the statute under which the writ was issued was unconsitutional. Southern Exp. Co. v. Sottile Bros., 131 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139, 144 (where statute has not been adjudged unconstitutional citing text); McAlister v. Chicago &c. R. Co., 74 Mo. 351. There would be, it seems to us, great difficulty in sustaining the doctrine of decision in the case cited if the statute had been adjudged unconstitutional, and it is, indeed, somewhat difficult even where there has been no such adjudication for an unconstitutional statute is absolutely void.

[26] We concur in the views of Mr. Freeman, who thus states the law: "The better rule would seem to be, however, that all that should be required of the carrier is to ascertain that the process is fair and valid on its face, for if it will justify the officer in serving it, it certainly ought to justify the carrier in yielding to it." Note to Kohn v. Richmond &c. R. Co. (37 S. Car. 1), 34 Am. St. 726, 736. But see Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. 301; Kiff v. Old Colony &c. R. Co., 117 Mass. 591, 19 Am. Rep. 429; Edwards v. White Line &c. Co., 104 Mass. 159, 6 Am. Rep. 213. And compare Georgia &c. R. Co. v. Knight, 11 Ga. App. 489, 75 S. E. 823.

regularity of the proceedings, are questions for the court and not questions which the carrier at its peril must decide. As we have said, the carrier must be free from fraud, collusion or connivance, or else it can not make the proceedings the basis of a defense.[27] Notice must be given promptly by the carrier, inasmuch as the failure to exercise care and diligence in that regard is a breach of duty.[28] It is held that where the carrier yields possession to an officer who has no writ it is not excused,[29] but we suppose that if the officer was actually entitled to the possession and the consignor or consignee was not, the carrier would be excused. We base our conclusion upon the rule that if the delivery is, in fact, made to the right person, the carrier is not guilty of a breach of duty.[30] If, however, the carrier assumes to yield without a writ, it takes upon itself the burden of showing that the officer was the right person, and this it could not do without showing that neither the consignor nor the consignee was entitled to the goods, for it is quite clear that a surrender

[27] Ante, 2209. See also American Exp. Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525, 15 Ann. Cas. 536; Western &c. R. Co. v. Ohio &c. Trust Co., 107 Ga. 512, 33 S. E. 821; Lincoln Grain Co. v. Chicago &c. R. Co., 91 Nebr. 203, 135 N. W. 443. In the last two cases the seizure resulted from wrongful detention or diversion by the carrier and it was held liable.

[28] Ante, 2209. See also Southern Exp. Co. v. Sotille Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139, 144 (citing text); Cleveland &c R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, Ann. Cas. 1916B, 1217n; Thomas v. Express Co., 73 Minn. 185, 75 N. W. 1120; Taugher v. Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579.

[29] Bennett v. American &c. Co., 83 Maine 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. 774. See also Merz v. Chicago &c. R. Co., 86 Minn. 33, 90 N. W. 7 (process must be valid on its face); Neckey v. St. Louis &c. R. Co., 35 Mo. App. 79; Fehrenbach Wine &c. Co. v. Atchison &c. R. Co., 182 Mo. App. 1, 167 S. W. 631.

[30] Idaho, The, 93 U. S. 575, 23 L. ed. 978; Cleveland &c. R. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 480; Western &c. Co. v. Barber, 56 N. Y. 544; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Wells v. American &c. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; Biddle v. Bond, 6 Best & S. 225; Sheridan v. New Quay &c. Co., 4 Com. B. (N. S.) 618.

to an officer simply because he was an officer would not be a sufficient foundation for a defense. If the officer were a mere intruder or volunteer having no color of right or authority, or if the question of ownership was voluntarily made by the carrier, we think the conclusion required by authority is that a surrender to the officer could not be made available as a defense.[31] If goods are levied upon under an attachment which is subsequently dissolved it then usually becomes the duty of the carrier to transport them as nearly as may be according to its original undertaking.[32] It has been held, one of the judges dissenting, that a carrier is not bound to deliver possession to a mortgagee,[33] but we suppose that if the carrier could show that the mortgagee was justly entitled to possession it would be protected.[34]

§ 2314 (1538). Attachment — Garnishment. — The question whether property in the hands of a common carrier while in transitu can be attached or reached by process in garnishment has not been so much discussed in reference to railroad companies as with reference to express companies, and the rules upon the subject have not been very clearly laid down. We

[31] Laclouch v. Towle, 3 Esp. 114; Kieran v. Sanders, 6 Ad. & El. 515; Shelbury v. Scotsford, Yelv. 23; Wilson v. Anderton, 1 B. & Ad. 450; Gosling v. Birnie, 7 Bing. 339; Burroughes v. Bayne, 29 L. J. Exch. 185; Crouch v. Great Western &c. R. Co., 26 L. J. Exch. 418. Attention has been called to the change in the statements in Story on Bailments by the courts and text writers, and to the fact that in the earlier editions the rule was asserted to be that delivery to the real owner would protect the carrier, while in later editions a different doctrine was stated. Sheridan v. New Quay &c. Co., 4 Com. B. (N. S.) 618; Wells v. American &c. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

[32] Faust v. South Carolina R. Co., 8 S. Car. 118.

[33] Kohn v. Richmond &c. R. Co., 37 S. Car. 1, 16 So. 376, 24 L. R. A. 100, 34 Am. St. 726, 55 Am. & Eng. R. Cas. 675.

[34] The conclusion asserted in the text may be supported upon the principle that delivery to the right person relieves the carrier. See also Johnson v. Chicago &c. R. Co., 70 Nebr. 364, 97 N. W. 479. But, of course, the carrier assumes the burden of proving that the delivery was to the proper person. We suppose, also, that the carrier must not, on its own volition without an effective demand, deliver possession to a mortgagee. Rosenfeld v. Express Co., 1 Woods (U. S.) 131.

think, however, that a majority of the best considered authorities warrant the conclusion that property while in itinere, in actual transit, can not be attached by creditors, perhaps, nor reached by process in garnishment.[35] This is certainly so where the property is not within the jurisdiction of the court out of which the process issues.[36] But if not in actual transit property may usually be attached or the carrier subjected to garnishment in a proper case, and in a number of cases it has been held that this is also true, especially as to attachment, even where the property is in actual transit.[37] Where the custody of the railroad company in the

[35] Western &c. R. Co. v. Thornton, 60 Ga. 300; Illinois Central R. Co. v. Cobb, 48 Ill. 402; Michigan &c. R. Co. v. Chicago &c. R. Co., 1 Ill. App. 399; Pittsburgh &c. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377; Dart Mfg. Co. v. Carr, 174 Iowa 471, 156 N. W. 714, L. R. A. 1916E, 449; Louisville &c. R. Co. v. Spalding (Ky.), 22 Am. & Eng. R. Cas. 418; Stevenot v. Eastern R. Co., 61 Minn. 104, 63 N. W. 256; Baldwin v. Railroad Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. 370; Bates v. Chicago &c. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369; Kuehn v. Nero, 145 Wis. 256, 130 N. W. 56. Most of these cases, however, relate to garnishment and the rule as to attachment seems to be more questionable. It is held in Brinsberg v. Hartenfeld Bag Co., 89 N. J Eq. 425, 105 Atl. 68, that under the federal Uniform Bill of Lading Act of Aug. 29, 1916, and the similar state act it can not be attached unless the bill has been surrendered to the carrier or negotiation has been enjoined.

[36] Montrose &c. Co. v. Dodson &c. Co., 76 Iowa 172, 40 N. W. 705, 2 L. R. A. 417, 14 Am. St. 213; Bates v. Chicago &c. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369. See Pennsylvania &c. R. Co. v. Pennock, 51 Pa. St. 244, 254; Santa Fe Pac. R. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977; Pittsburgh &c. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377; Sutherland v. Peoria Second Nat. Bank, 78 Ky. 250.

[37] Clifford v. Brockton Transp. Co., 214 Mass. 466, 101 N. E. 1092, Ann. Cas. 1914B, 909 and note; Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317n; Landa v. Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. 459, and note; Hett v. Boston &c. R. Co., 69 N. H. 139, 44 Atl. 910. See also Davis v. Cleveland &c. R. Co., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; Malott v. Johnson, 37 Ind. App. 678, 77 N. E. 866; Stock v. Reynolds, 121 Mich. 356, 80 N. W. 289; Sante Fe &c. R. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977; Penna. R. Co. v. Peoples, 31 Ohio St. 537; Jewett v. Olsen, 18 Ore. 419, 23 Pac. 262, 17

capacity of common carrier has terminated and the company is in possession as warehouseman and title in the principal attachment defendant has vested, then, as we believe, the goods may, in the proper case, be seized under a writ of attachment,[38] but even then there may be rights paramount to those of the attaching creditor, for the creditor can not secure greater rights as against the lien of the company or as against prior equities than the debtor had at the time the attachment lien became effective.[39] In cases where an attachment is issued and levied the carrier must at once give proper notice or the proceedings will not of themselves constitute a defense. As a rule an attachment can not be effective as against the consignor, since the consignee is presumptively the owner of the goods from the time of their delivery to the carrier,[40] but the rule that

Am. St. 745; McLoughlin v. Kough, 3 Newwfoundl. 205. See as to attachment under federal Uniform Bill of Lading Act, Aug. 29, 1916, ch. 45; Barnes' Fed. Code § 8000; and Brinsberg v. Hartenfeld, 89 N. J. Eq. 425, 105 Atl. 68.

[38] Cooley v. Minnesota &c. R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609; citing Drake Attachment, 453; Stiles v. Davis & Barton, 1 Black (U. S.) 101, 17 L. ed. 33. See also Pittsburgh &c. R. Co. v. Cox, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377.

[39] An attachment lien is, as a rule, subordinate to the vendor's right of stoppage in transitu. Post § 2317. In Dreyfus v. Mayer, 69 Miss. 282, 12 So. 267, it was held that the vendor's right of stoppage in transitu extended to the money in the hands of an officer derived from the sale of property under a writ of attachment.

[40] Redd v. Burrus, 58 Ga. 574; Bingham v. Lamping, 26 Pa. St. 340, 67 Am. Dec. 418. As to when goods may be attached see Peabody v. Maguire, 79 Maine 572; Grant v. Shaw, 16 Mass. 341, 8 Am. Dec. 142; Balderston v. Manso, 2 Cranch. C. C. 623; Price v. Bradford, 4 La. 35; Dolsen v. Brown, 13 La. Ann. 551; Walker v. Detroit &c. R. Co., 49 Mich. 446, 13 N. W. 812. As to carrier being protected for delivering to owner, goods seized under legal process, although he was not the attachment defendant, see Indiana &c. R. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. 264 (with which compare Simpson v. Dufour, 126 Ind. 322, 26 N. E. 69, 22 Am. St. 590); Landa v. Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. 459; Furman v. Chicago &c. R. Co., 81 Iowa 540, 46 N. W. 1049. But see Edwards v. White Line &c. Co., 104 Mass. 159, 6 Am. Rep. 213, and compare Walker v. Detroit &c. R. Co., 49 Mich. 446, 13 N. W. 812, 9 Am. & Eng. R. Cas. 251; Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695, 6 Am. & Eng. R. Cas. 298.

the consignee is to be deemed the owner, is, as elsewhere shown, subject to important limitations and qualifications, and the presumption is usually a rebuttable one.

§ 2315 (1538a). Acts of customs officials and collectors of ports.—The parties to a contract of carriage into foreign territory, it is said, must be presumed to have contracted with the common knowledge of the necessity for customs detention and inspection, and the shipper should make provision for the passage of his property beyond the borders, if non-dutiable. As the carrier can not prevent its proper seizure and detention, it is held that the carrier is not liable for its destruction, while so detained in the possession of the customs officials, by a fire, which it did not cause and could not have prevented.[41] But where goods are so detained until the duty thereon is paid, the carrier should notify, or take proper steps to notify the consignee or shipper, having turned the goods over to the authorities or stored them in a suitable and reasonably safe place.[42] And, where a carrier agrees to ship by a certain steamer of a connecting carrier on a certain day, the erroneous or mistaken refusal of the collector of the port to grant a clearance while certain freight was on board, claiming it to be contraband of war, does not excuse the carrier from the failure to perform such special contract, lawfully made with knowledge that difficulties might arise

[41] Parker v. Steamship Co., 74 App. Div. 16, 76 N. Y. S. 806; Howell v. Grand Trunk R. Co., 92 Hun 423, 36 N. Y. S. 544. See also Penna. Co. v. Canadian Pac. R. Co., 107 Ill. App. 386; but compare White v. Canadian Pac. R. Co., 6 Man. 169. See also as to legal seizure under police regulation, St. Louis &c. R. Co. v. Gans, 69 Ark. 252, 62 S. W. 738; Eager v. Jonesboro &c. Exp. Co., 103 Ark. 288, 147 S. W. 60; Southern Exp. Co. v. Soltile Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139; Alabama &c. R. Co. v. Tirelli Bros., 93 Miss. 797, 48 So. 962, 21 L. R. A. (N. S.) 731, 136 Am. St. 559, 17 Ann. Cas. 879. But compare where seizure was illegal, Bennett v. American Exp. Co., 83 Maine 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. 774; Merriman v. Great Northern Exp. Co., 63 Minn. 543, 65 N. W. 1080; Fehrenbach Wine &c. Co. v. Atchison &c. R. Co., 182 Mo. App. 1, 167 S. W. 631.

[42] Pennsylvania Co. v. Railway Co., 107 Ill. App. 386. As to when carrier must pay custom charges, see Mitchelson v. Minneapolis &c. R. Co., 67 Minn. 406, 69 N. W. 1106.

in the course of transportation because of the character of the freight.[43]

§ 2316 (1539.) Stoppage in transitu—General doctrine.—Among the excuses for non-delivery of goods by a railroad carrier, is generally considered that founded upon the exercise of the right of stoppage in transitu, for in cases where this right is justly exercised the carrier is excused for a failure to deliver the goods entrusted to it for transportation. Under the settled rule that the consignee, nothing to the contrary appearing, is entitled to have a delivery made to him, the carrier is not excused unless the right of stoppage in transitu exists and is properly exercised. The right of stoppage in transitu is not an absolute right nor can it be made available by all who have an interest in the goods in the hands of the carrier,[44] nor, indeed, can it be always effectively exercised by the vendor of the goods, since the rights of third persons may intervene or other circumstances may make it unjust to permit the exercise of the right. It may be said generally that the right of stoppage in transitu[45] is a right residing in the vendor of goods, under certain conditions, to stop them while in the possession of the railroad company and before they have reached the purchaser or consignee.[46] The rule which permits

[43] Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269. See however where the government intervenes to prevent the performance of the contract. Touteng v. Hubbard, 3 Bos. & P. 291. And compare Chicago &c. R. Co. v. Hoyt, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. ed. 625.

[44] Sweet v. Pym, 1 East 4; Jenkyns v. Usborne, 7 Man. & G. 678. See also Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26. Rights of third persons may, of course, intervene and defeat the vendor's right to stop in transitu.

[45] As to the persons against whom the right may be exercised, see Sheppard v. Newhall, 54 Fed. 306; Stanton v. Eager, 16 Pick. (Mass.) 467; Akerman v. Humphery, 1 Car. & P. 53; Newhall v. Central &c. R. Co., 51 Cal. 345, 21 Am. Rep. 713.

[46] Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84 and note; Stiles v. Howland, 32 N. Y. 309; Babcock v. Bonnell, 80 N. Y. 244; Pool v. Columbia &c. R. Co., 23 S. Car. 286; Howe v. Stewart, 40 Vt. 145; Lickbarrow v. Mason, 2 Term. R. 63; Nicholls v. Le Feuvre, 2 Bing. N. C. 81; James v. Griffin, 1 M. & W. 20; Edwards v. Brewer, 2

the stoppage of goods in transitu is said to be founded on the principle that the property of one person who has not received payment for it shall not be taken by creditors of the vendee in satisfaction of their debts,[47] and as this is the foundation of the rule, it follows that insolvency of the vendee must appear in order to justify an exercise of the right.[48] The authorities require the conclusion that the right of stoppage in transitu does not exist, even though the buyer is insolvent, if that fact was known to

M. & W. 375; Coates v. Railton, 6 B. & C. 422; Gibson v. Carruthers, 3 Mees. & W. 321; Oppenheim v. Russell, 3 Bos. & P. 42; Wright v. Snell, 5 Barn. & Ald. 350; Oppenheim v. Russell, 3 Bos. & P. 42. See for other and fuller or more exact definitions. Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26, 27, 28 and note. The right of stoppage in transitu is a favored one, and will avail against creditors, even though they may be lienholders. Kingman v. Denison, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. 711; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760; Schuster v. Carson, 28 Nebr. 612, 44 N. W. 734, 42 Am. & Eng. R. Cas. 360; Estey v. Truxel, 25 Mo. App. 238; Durgy Cement &c. Co. v. O'Brien, 123 Mass. 13; Chicago &c. R. Co. v. Painter, 15 Nebr. 394, 19 N. W. 488. As to waiver of right by owners suing out a writ, see Woodruff v. Noyes, 15 Conn. 335; Allyn v. Willis, 65 Tex. 65; Halff v. Allyn, 60 Tex. 278, 57 Am. Rep. 602. See generally Thompson v. Thompson, 4 Cush. (Mass.) 127; Blum v. Monks, 21 La. Ann. 268, 99 Am. Dec. 725; Blackman v. Pierce, 23 Cal. 508; Hause v. Judson, 34 Ky. 7, 29 Am. Dec. 377. See Benjamin Sales, §§ 1229, 1231.

[47] Burghall v. Howard, 1 H. Bl. 366n; Snee v. Prescot, 1 Atk. 245; Benedict v. Schaettle, 12 Ohio St. 515; Wheeling &c. R. Co. v. Koontz, 5 N. P. 15, 7 Ohio Dec. 478, affd. in 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. 435.

[48] Conyers v. Ennis, 2 Mason (U. S.) 236; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Bayonne v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114 and note; Cox v. Burns, 1 Iowa 64; Naylor v. Dennie, 25 Mass. 198, 19 Am. Dec. 319; Gustine v. Phillips, 38 Mich. 674; Chicago &c. Co. v. Painter, 15 Nebr. 394, 19 N. W. 488; Clark v. Lynch, 4 Daly (N. Y.) 83; Buckley v. Furniss, 15 Wend. (N. Y.) 137; Harris v. Pratt, 17 N. Y. 249; Reynolds v. Boston &c. Co., 43 N. H. 580; Benedict v. Schaettle, 12 Ohio St. 515; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; Allyn v. Willis, 65 Tex. 65. But it has been held that apparent insolvency, without actual insolvency, is sufficient. Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531. See also Jeffris v. Fitchburg P. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919.

the seller at the time the sale was made.[49] A valuable opinion upon the question as to what is sufficient evidence of insolvency is found in a case recently decided by the supreme court of Wisconsin, as well as upon other questions affecting the right of stoppage in transitu.[50] The question as to the duty of the carrier to act upon the demands of the vendor and his assertion that the buyer was insolvent, has received consideration, and it has been held that the carrier is justified in acting upon the assertion and yielding to the demand.[51] We think it quite clear that if the assertion of insolvency is true, and the right of stoppage in transitu is not impaired by the intervening rights of third persons, the carrier is exonerated, but we suppose, that, at all events, the carrier must exercise care and diligence in regard to the demands of the vendor, and in yielding to it assumes some risk.[52]

[49] Blum v. Marks, 21 La. Ann. 268, 99 Am. Dec. 725; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Evans &c. Cultivator Co. v. Missouri &c. R. Co., 64 Mo. App. 305; Fenkhausen v. Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760; Houston &c. R. Co. v. Poole, 63 Tex. 246. It was argued in the case of Bird of Paradise, The, 5 Wall. (U. S.) 545, 18 L. ed. 662, that where a carrier undertook to transport goods, and in payment of charges accepted a time draft it could stop the goods, but the court held otherwise. Counsel based their contention upon the analogy supplied by the cases affirming the right of stoppage in transitu, and cited Benedict v. Field, 16 N. Y. 595.

[50] Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919, 12 National Corp. 691. See also Coleman v. New York &c. R. Co., 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; Seigfried v. Chicago &c. R. Co., 147 Mo. App. 543, 126 S. W. 798.

[51] E. H. Pray, The, 27 Fed. 474, citing Tigress, The, Browning & L. 38.

[52] Vidette, The, 34 Fed. 396; Allen v. Maine &c. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310; Poole v. Houston &c. R. Co., 58 Tex. 134; Bloomingdale v. Memphis &c. R. Co., 6 Lea. (Tenn.) 616. The carrier may insist on time to make inquiry, and may, and should, for safety, it seems, resort to legal proceedings to have the question determined. Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527. See generally Johnston v. Chicago &c. R. Co., 70 Nebr. 364, 97 N. W. 479; Gulf &c. R. Co. v. Potter Bros. (Tex. Civ. App.), 104 S. W. 402; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Howe v. Cincinnati &c. R. Co., 18 Ohio C. C. 333.

§ 2317 (1539a.) Stoppage in transitu—Not defeated by seizure under legal process.—The right of stoppage in transitu is not defeated by seizure of the property before delivery to the buyer, by attachment proceedings instituted by his creditors.[53] And this has been held true as to an attachment by the carrier for freight arrearages due from the consignee.[54] Payment of freight by an attaching creditor will not render the attachment superior to the right of stoppage,[55] but it is held that he may thus become subrogated to the rights of the carrier so far as to have the right to retain the goods until reimbursed therefor.[56] It seems, however, that an attachment by the vendor, may operate as a waiver of his right of stoppage.[57] The carrier, it has been held, is not bound to notify the vendor of the attachment or take affirmative steps to prevent attachment where he already has such knowledge,[58] nor to notify the attaching officer of the notice of stoppage

[53] In re New York &c. Goods Co., 169 Fed. 612; In re J. F. Growe Constr. Co., 256 Fed. 907; Bayonne &c. Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114 and note; Mason v. Wilson, 43 Ark. 172; Woodruff v. Noyes, 15 Conn. 335; O'Neill v. Garrett, 6 Iowa 480; Seymour v. Newton, 105 Mass. 272; Chicago &c. R. Co. v. Pointer, 15 Nebr. 394, 19 N. W. 488; Buckley v. Furniss, 15 Wend. (N. Y.) 137, 17 Wend. 504; Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009, 86 Pac. 791; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796 and note. Many other authorities might be cited to the same effect. See 26 Am. & Eng. Enc'y of Law (2d ed.) 1111, 1112. See also (right superior to that of trustee in bankruptcy).

[54] Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760.

[55] Greve v. Dunham, 60 Iowa 108, 14 N. W. 130; More v. Lott, 13 Nev. 376; Heinz v. Railroad Transfer Co., 82 Mo. 233.

[56] Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Longstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49 and note, and first case cited in last note supra.

[57] Woodruff v. Noyes, 15 Conn. 335; Fox & Bro. v. Willis & Bro., 60 Tex. 373; Ferguson v. Herring, 49 Tex. 126. But see Allyn v. Willis, 65 Tex. 65. So he may waive it by taking other inconsistent steps. Calahan v. Babcock, 21 Ohio St. 294, 8 Am. Rep. 63; Kearney &c. Co. v. Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. 434. But see as to what is not a waiver. Brewer Lumber Co. v. Boston &c. R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. 375; Mohr v. Boston &c. R. Co., 106 Mass. 67.

[58] McVeagle v. Atchison &c. R. Co., 3 N. Mex. 205, 5 Pac. 457;

and request him to deliver the goods to the buyer.[59] But it, as well as the other parties, may intervene in a proper case.[60]

§ 2318 (1540.) Who may exercise the right of stoppage in transitu.—The right of stoppage in transitu may, in a proper case, be exercised by an agent or other representative of the seller, as for example, by a factor, or purchasing agent.[61] The general rule is that privity of contract must exist between the parties.[62] Thus is is held that the seller[63] can only exercise the right against his own vendee.[64] In the absence of a statute the general rule

Baltimore &c. R. Co. v. Davis (Pa.), 12 Atl. 335.

[59] French v. Star &c. Transp. Co., 134 Mass. 288.

[60] See Howe v. Cincinnati &c. R. Co., 10 Ohio Circ. Dec. 182; Parker v. M'Iver, 1 Desano (S. Car.) 274, 1 Am. Dec. 656; Bender v. Bowman, 2 Pearson (Pa.) 517; Eastern &c. Co. v. Gill, 9 Pa. Co. Ct. 630.

[61] Feise v. Wray, 3 East 93; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188. See as to the rights of an agent seeking to protect himself, Gwyn v. Richmond &c. R. Co., 85 N. C. 429, 39 Am. Rep. 708, 6 Am. & Eng. R. Cas. 452; Newhall v. Vargas, 13 Maine 93, 92 Am. Dec. 489; Ilsley v. Stubbs, 9 Mass. 71, 6 Am. Dec. 29; Seymour v. Newton, 105 Mass. 272; Sassaboglou v. Gibb, L. R. 11 Q. B. D. 797; Phelps v. Comber, L. R. 29 Ch. Div. 813; Imperial Bank v. London &c. Co., L. R. 5 Ch. D. 195; See generally Kinloch v. Craig, 3 T. R. 119.

[62] Memphis &c. R. Co. v. Freed, 38 Ark. 614; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Switzler v. Northern Pac. R. Co., 45 Wash. 221, 88 Pac. 137, 12 L. R. A. (N. S.) 254, 122 Am. St. 892, 13 Ann. Cas. 357. The mere fact that one has a lien on the goods does not give him the right. Lenahart v. Cooper, 3 Bing. N. Cas. 99; Sweet v. Pym, 1 East 4.

[63] See Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26; Delta Bag Co. v. Kearns, 112 Ill. App. 269. Only the vender or quasi vender. Tucker v. Humphrey, 4 Bing. 516; Ilsley v. Stubbs, 9 Mass. 65, 6 Am. Dec. 29. But the right may be exercised through an agent. Seymour v. Newton, 105 Mass. 272; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Chandler v. Fulton, 10 Lex. 2, 60 Am. Dec. 188. As to the rights of a pledgee, see next section. See also Missouri &c. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861; First National Bank v. Meyer, 43 La. Ann. 1, 8 So. 433; Ratzer v. Burlington &c. R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530.

[64] Memphis &c. R. Co. v. Freed, 38 Ark. 614, 9 Am. & Eng. R. Cas. 212. See also Long-Bell Lumber Co. v. Chicago &c. R. Co., 181 Mo. App. 223, 167 S. W. 1183. See also Neimeyer Lumber Co. v. Burlington R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534. As to the effect of a seizure under legal pro-

is that a surety of the vendee can not exercise the right.[65] The assignee who succeeds to the rights of the seller of a bill of lading has been held to have a right to stop goods in transitu.[66] The vendor's right may be effectively taken away by the intervention of the rights of a third person entitled to protection, as, for example, by the intervention of the rights of an assignee of the bill of lading.[67]

§ 2319 (1541) Against whom the right of stoppage in transitu may be exercised.—It would be foreign to the scope of our work to fully discuss the questions which arise where the rights of third persons intervene, but it seems necessary to briefly treat

cess upon the right of stoppage in transitu, see Schuster v. Carson, 28 Nebr. 612, 44 N. W. 734, 42 Am. & Eng. R. Cas. 360; Estey v. Truxel, 25 Mo. App. 238; Couture v. McKay, 6 Manitoba L. 273.

[65] Freeman v. Birch, 3 Q. B. 492, note; Leuckart v. Copper, 3 Bing. N. C. 99, 32 E. C. L. 54; Morley v. Hay, 3 M. & Ryland 396. See also Siffken v. Wray, 6 East 371. But it is held that where the transfer is procured by fraud the right of stoppage is not lost. Evansville &c. R. Co. v. Erwin, 84 Ind. 457, 466. See ante, §§ 2148, 2149; St. Paul &c. R. Co. v. Great Western &c. R. Co., 27 Fed. 434; Sheppard v. Newhall, 54 Fed. 306. As to the difference between cases where a third person buys property and receives bill of lading and where no bill of lading is transferred, see Pattison v. Culton, 33 Ind. 240, 5 Am. Rep. 199, distinguishing Coxe v. Harden, 4 East 211; Dews v. Greene, 32 Barb. (N. Y.) 490; Lee v. Kimball, 45 Maine 172. But one having an interest without a bill of lading was held to have the right in Jenkyns v. Osborne, 8 Scott (N. R.) 505, 7 M. & G. 678. See also Delta Bag Co. v. Kearns, 112 Ill. App. 269, and cases there cited.

[66] Gossler v. Schepeler, 5 Daly (N. Y.) 476; Morrison v. Gray, 2 Bing. 260, 9 E. C. L. 570. But see Waring v. Cox, 1 Camp. 369; Lake Shore &c. R. Co. v. National Live Stock Bank, 178 Ill. 506, 52 N. E. 326; Lessaier v. Southwestern, 2 Woods (U. S.) 35, Fed. Cas. No. 8, 274.

[67] Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861. See National Bank v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566. See also National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321; Morris v. Shyrock, 50 Miss. 590; Long-Bell Lumber Co. v. Chicago &c. R. Co., 181 Mo. App. 223, 167 S. W. 1183; First National Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479. See also as to rule under federal Uniform Bill of Lading Act, Barnes' Fed. Code § 8016; Act Aug. 29, 1916, Ch. 415; 39 Stat. 544.

the general subject. Where bona fide purchasers acquire the goods the right is gone, but if the railroad carrier is ignorant of the acquisition of such rights, acts in good faith and exercises reasonable care and diligence it will not be liable if it yields to the right when properly asserted by the vendor. Where, however, the indorsement of bills of lading, or, doubtless, the absence of an outstanding bill of lading,[68] shows or indicates that the vendor's right has been assigned or has ceased to exist the carrier can not rightfully yield to the claim of the vendor. In cases where bills of lading have been so effectively indorsed as to transfer title to the assignee the vendor can not rightfully exercise the right of stoppage in transitu.[69] It is held that a bona fide holder of a bill of lading assigned as collateral security is invested with a title to the goods paramount to the vendor's right of stoppage in transitu, but that one who receives the bill of lading as collateral security for an antecedent debt is not a bona fide holder as against the vendor whose claim for the price of the goods is unpaid,[70] although he would be such a holder as against

[68] Ratzer v. Burlington &c. R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. 530. Where the bill of lading is issued without authority the assignee is not protected at common law. National Bank &c. v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566.

[69] Sheppard v. Newhall, 54 Fed. 306; Stanton v. Eager, 16 Pick. (Mass.) 467; Ackerman v. Humphery, 1 Car. & P. 53; Newhall v. Central &c. R. Co., 51 Cal. 345, 21 Am. Rep. 713; Missouri &c. R. Co. v. McLiney, 32 Mo. App. 166. See ante, §§ 2146, 2149; Branhan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26; National Bank v. Baltimore &c. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. 321n; Missouri &c. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861.

[70] Dymock v. Missouri &c. R. Co., 54 Mo. App. 400; Missouri &c. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. 861; First National Bank v. Meyer, 43 La. Ann. 1, 8 So. 433. See also Wheeling &c. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. 435; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Barnard v. Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Lessaier v. Southwestern, The, 2 Woods (U. S.) 35. But compare Lumber Co. v. Burroughs, 62 N. J. L. 469, 41 Atl. 695; St. Paul Roller Mill Co. v. Great Western Despatch Co., 27 Fed. 434; First Nat. Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479; Leask v. Scott, 2 Q. B. Div. 376; Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592; Clementson v. Grand Trunk R. Co., 42 U. C. Q. B. 263.

the assignor of the bill, for as between the immediate parties an antecedent debt is a valid consideration.[71]

§ 2320 (1542.) **Mode of exercising the right of stoppage in transitu—Duty of carrier to give notice.**—The earlier authorities inclined to the doctrine that in order to an effective exercise of the right of stoppage in transitu the vendor must secure possession of the goods but the rule now is that it is not necessary that the vendor should obtain actual possession. Notice is, however, essential to an effective exercise of the vendor's right.[72] When a demand is made upon the railroad carrier it must promptly give notice to the consignee of the vendor's assertion of the right of stoppage in transitu.

§ 2321 (1543.) **Termination of the right of stoppage in transitu.**—It is obvious that where the goods have come into the hands of the consignee by actual delivery the right of stoppage in transitu is at an end.[73] This is true although the vendor may

[71] Hewitt v. Powers, 84 Ind. 295.

[72] Allen v. Maine &c. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310, 30 Am. & Eng. R. Cas. 122; Ascher v. Grand Trunk &c. R. Co., 36 U. C. Q. B. 609; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Whitehead v. Anderson, 9 M. & W. 518. We suppose that, although no great formality or precision is required, the vendor's notice must be such as to fairly apprize the carrier of the vendor's purpose to regain possession of the goods. Phelps v. Comber, L. R. 29 Ch. Div. 813; Clementson v. Grand Trunk &c. R. Co., 42 U. C. Q. B. 263. See generally Poole v Houston &c. R. Co., 58 Tex. 134, 9 Am. & Eng. R. Cas. 197; Kemp v. Falk, L. R. 7 App. Cas. 573; Litt v. Cowley, 7 Taunt. 169; Mottram v. Heyer, 5 Denio (N. Y.) 629. See also 23 Am. & Eng. Ency. of Law 926; Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Allen v. Maine Cent. R. Co., 79 Maine 327, 1 Am. St. 310; Longstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49; Faust v. Southern R. Co., 74 S. Car. 360, 54 S. E. 566; Phillips &c. Co. v. Northwestern R. Co., 108 S. Car. 166, 93 S. E. 868 (upon carrier's receipt of consignor's notice, title revested in consignor vender); Bloomingdale v. Memphis &c. R. Co., 6 Lea (Tenn.) 616.

[73] In re New York &c. Goods Co., 169 Fed. 612; In re Paterson Co., 186 Fed. 629, 34 L. R. A. (N. S.) 31; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Brewer Lumber Co. v. Boston &c. R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. 375, 54 L. R. A. 435; Wheles v. Meyer-Schmidt Grocer Co., 140

lawfully exercise the right of recaption since the right of recaption is not the same thing as the right of stoppage in transitu.[74] It will be found upon an examination of the adjudged cases that the dispute has fallen upon the question as to what is a sufficient delivery to defeat the right of stoppage in transitu for there is no controversy as to the effect of a sufficient delivery nor has there been from the earliest years of the common law, since it has been steadily held that a sufficient delivery to the consignee defeats the right.[75] It may be said generally that the test as to the sufficiency of a delivery to a consignee is not the same where the question is solely between the railroad company and the consignee or owner as the test where the question arises in cases between vendor and purchaser and involves the right to stop the goods in transitu, for a delivery may be sufficient to relieve from liability as a carrier and yet not sufficient to defeat

Mo. App. 572, 120 S. W. 708. In a case where goods were placed in possession of a drayman and by him taken to the store of the consignees, who declined to receive them for the reason that their store had been destroyed by fire and the goods were returned to the company it was held that the transit was at an end so far as concerned the right of stoppage in transitu. O'Nead v. Day, 53 Mo. App. 139; Shoninger v. Day, 53 Mo. App. 147; James Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108; Bolton v. Lancashire &c. R. Co., 1 C. P. 431. See Mollison v. Lockhart, 30 N. Brunswick 398.

[74] In cases where the owner may lawfully retake goods under the right of recaption and he properly exercises such right and retakes the goods there can not be any liability on the part of the carrier to the consignee, but while this is true, it is also true that while there is a close resemblance between the right of recaption and the right of stoppage in transitu there are well-marked differences.

[75] Wallace v. Natchez. The, 31 Fed. 615; Sheppard v. Newhall, 54 Fed. 306; Macon &c. R. Co. v. Meador, 65 Ga. 705; Greve v. Dunham, 60 Iowa 108, 14 N. W. 130; Symns v. Schotten, 35 Kans. 310, 10 Pac. 828; Brewer Lumber Co. v. Boston &c. R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. 375; Langstaff v. Stix, 64 Miss. 171, 1 So. 97; Klein v. Fischer, 30 Mo. App. 568; United States &c. Co. v. Oliver, 16 Nebr. 612, 21 N. W. 463; More v. Lott, 13 Nev. 376; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; Williams v. Hodges, 113 N. Car. 36, 18 S. E. 83; Lickbarrow v. Mason, 2 Term. R. 63; Foster v. Frampton, 6 B. & C. 107; Dixon v. Yates, 5 B. & Ad. 313; Tanner v. Scovell, 14 M. & W. 28. See also Benjamin Sales, §§ 839, 844, and

the right of stoppage in transitu.[76] The carrier is not, it is manifest, greatly concerned with the question as to the sufficiency of the delivery to defeat the right of stoppage in transitu in cases where the delivery is such as terminates its liability but it is concerned with the question as to when its duty to yield to the vendor's right to stop in transitu has ended in cases where it has possession of goods. If the goods have reached the place to which they were shipped and the railroad company there accepts them as the agent of the consignee and undertakes to hold possession of them as his agent and so holds possession the right of stoppage in transitu is at an end[77] but the right does not terminate when the goods arrive at the place to which they were shipped unless they go into the hands of the company as the agent of the consignee, insomuch as there must be a change in the capacity in which the company holds the goods for if it continues to hold them in its capacity as carrier or holds them as a warehouseman the right of the vendor is not at an end. The fact that the goods go into the possession of the company in its capacity of a warehouseman does not defeat the vendor's right, unless they are taken possession of, as just indicated, by the company in the capacity of agent for the consignee. As long as the goods are in transit or in the hands of a warehouseman or other person as incidental to or connected with their transportation the right of stoppage in transitu exists.[78] It may, indeed, be safely said that

cases cited in next to last preceding note; also note in 7 A. L. R. 1382 et seq.

[76] Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796. See also Johnson v. Eveleth, 93 Maine 306, 45 Atl. 35, 48 L. R. A. 50; Wheeling &c. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. 435; Jeffris v. Fitchburg &c. R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919.

[77] Wentworth v. Outhwaite, 10 M. & W. 436. See also Whitehead v. Anderson, 9 Mees. & W. 518; Powell v. Kechnie, 3 Dak. 319, 19 N. W. 410; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Clapp Bros. & Co. v. Peck, 55 Iowa 270, 7 N. W. 587; Langstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. St. 49; St. Louis &c. R. Co. v. McDavitt Bros. (Tex. Civ. App.), 165 S. W. 5 (citing text); Williams v. Hodges, 113 N. Car. 36, 18 S. E. 83. Citing 2 Benjamin Sales, § 1117.

[78] In re New York &c. Goods Co., 109 Fed. 612; Weber v. Baessler, 3 Colo. App. 459, 34 Pac. 261; McFetridge v. Piper, 40 Iowa 627; Brewer Lumber Co. v. Boston &c. R. Co., 179 Mass. 228, 60 N. E. 548,

the general rule is that as long as the company in any capacity except as agent of the consignee has control of the goods whether in the capacity of carrier or warehouseman the vendor's right is not terminated, for as long as anything remains to be done in order to complete a delivery to the consignee that long the right of stoppage in transitu endures.[79] The effect of a partial delivery received consideration in a late case and it was held that delivery of part of the goods will not defeat the right of stoppage in transitu, "as a delivery of part will not be a delivery of the whole

88 Am. St. 375, 54 L. R. A. 435; White v. Mitchell, 38 Mich. 390; Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096; Scott v. William B. Grimes &c. Co., 48 Mo. App. 521; Letts-Spencer Grocer Co. v. Missouri Pac. R. Co., 138 Mo. App. 352, 122 S. W. 10; Inslee v. Lane, 57 N. H. 454; Buckley v. Furniss, 15 Wend. (N. Y.) 137; Harris v. Pratt, 17 N. Y. 249; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Cabeen v. Campbell, 30 Pa. St. 254; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796; Bartram v. Farebrother, 4 Bing. 579. See generally Langstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49, 57; Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84, 92; Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Seymour v. Newton, 105 Mass. 272; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. 919.

[79] In re Burke, 140 Fed. 971; Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 838 (citing text); Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Scott v. William B. Grimes &c. Co., 48 Mo. App. 521; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Bethell v. Clark, L. R. 20 Q. B. D. 615; Lyons v. Hoffnung, L. R. 15 App. Cas. 391; Bolton v. Lancashire &c. R. Co., 1 L. R. C. P. 431. See also Coleman v. New York &c. R. Co., 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; Northern Grain Co. v. Wiffler, 223 N. Y. 169, 119 N. E. 393, 7 A. L. R. 1370 and note on pp. 1389, 1390, 1391. A carrier may, by contract, waive its lien for freight and make a complete delivery, without treating the freight as paid. Kemp v. Falk, 7 App. Cas. 573; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. There is no presumption that the lien was waived and a complete delivery made. Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. R. 424, 33 L. R. A. 351, 57 Am. St. 919; citing Cooper, Ex parte, L. R. 11 Ch. Div. 68; Buckley v. Fenniss, 17 Wend. (N. Y.) 504; Crawshay v. Eades, 1 Barn. & C. 181; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Symns v. Schotten, 35 Kans. 310, 10 Pac. 828. But the right of stoppage in transitu extends in general only to original shipment and is not revived or prolonged, after delivery, by re-

unless the circumstances show that it was intended so to operate."[80]

§ 2322 (1543a.) **Effect of stoppage in transitu.**—After the right of stoppage in transitu has been properly exercised, the carrier generally holds as a warehouseman, as the liability as carrier is thereby terminated, and no new contract of carriage is created by the mere request of the seller to forward the goods to another destination, where the carrier in no way undertakes to do so.[81] The lien of the carrier for the freight is superior to the vendor's right of possession, and the carrier may retain the property, in a proper case, until the freight is paid.[82] The vendor

shipment. Brooke Iron Co. v. O'Brien, 135 Mass. 442; Norfolk Hardwood Co. v. New York &c. R. Co., 202 Mass. 160, 88 N. E. 664; Becker v. Hallgarten, 86 N. Y. 167; In re Paterson, 186 Fed. 629, 34 L. R. A. (N. S.) 31.

[80] Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 427, 33 L. R. A. 351, 57 Am. St. 919, 12 National Corp. 691; Dixon v. Yates, 5 B. & Ad. 340, 27 E. C. L. 86; Ocean Steamship Co. v. Ehrlich, 88 Ga. 502, 14 S. E. 707, 30 Am. St. 164; White v. Welsh, 38 Pa. St. 396; Buckley v. Fenniss, 17 Wend. (N. Y.) 504. But part delivery may operate as constructive delivery of the whole under particular circumstances. Hammond v. Anderson, 1 B. & P. N. R. 69; Ex parte Cooper, L. R. 11 Ch. D. 68; Secomb &c. Co. v. Nutt, 14 B. Mon. (Ky.) 324; Hall v. Dimond, 63 N. H. 565; Stevens v. Wheeler, 27 Barb. (N. Y.) 658. For other cases in which it was held delivery was sufficient, see Lane v. Jackson, 5 Mass. 157; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71 (for jury); Mohr v. Jackson &c. R. Co., 106 Mass. 72; Lewis v. Sharvey, 58 Minn. 464; Cartwright v. Wilmerding, 24 N. Y. 521; Poole v. Houston &c. R. Co., 58 Tex. 134; Gibbs, Ex parte, 1 Ch. D. 101; Bird v. Brown, 4 Exch. 786. For cases of insufficient delivery, see Mann v. White River &c. Co., 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141; Weber v. Baessler, 3 Colo. App. 459, 34 Pac. 261; Greve v. Dunham, 60 Iowa 108, 14 N. W. 130; Heinz v. Railroad Transfer Co., 82 Mo. 233; Reynolds v. Boston &c. R. Co., 43 N. H. 580; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 11 Am. St. 760; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Bolton v. Lancashire &c. R. Co., L. R. 1 C. P. 431. See also as to constructive delivery and what is sufficient, note in 7 A. L. R. 1386-1394.

[81] McVeagh v. Atchison &c. R. Co., 3 N. Mex. 205, 5 Pac. 457.

[82] Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Hays v. Monille, 14 Pa. St. 48; Pennsylvania &c. Co. v. Georgia R. &c. Co., 94 Ga. 636, 21 S. E. 577;

who wrongfully stops goods has been held liable to the carrier in a proper case for damages recovered against the carrier on account of a refusal to deliver the property because of the notice of stoppage.[83] And so, on the other hand the carrier has been held liable to the buyer for refusal to deliver to him or delivering to the wrong person when there was no right of stoppage,[84] as well as to the seller where was a right of stoppage duly exercised and wrong delivery.[85]

§ 2323 (1544.) Adverse claimants—Procedure on part of carrier—Interpleader.—In cases where claims are made to goods in the hands of a railroad carrier by persons not known in the contract of carriage proper notice should be promptly given.[86] It is, however, not safe to rely on notice alone in cases where legal proceedings have not been taken, for where the carrier assumes to decide between rival claimants it may incur a liability, since if it yields possession it takes the risk of correctly determining which of the rival claimants is entitled to the property. It has been held that a bill of interpleader filed by a carrier in a case where goods were in controversy is not sufficient where it shows that the attachment was not levied,[87] but we think that

Crass v. Memphis &c. R. Co., 96 Ala. 447, 11 So. 480, 55 Am. & Eng. R. Cas. 659. But not for charges due on other shipments. Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. 885; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760; Leuckart v. Cooper, 3 Bing. N. Cas. 99, 32 E. C. L. 55.

[83] Betts v. Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29.

[84] Betts v. Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29; Memphis &c. R. Co. v. Freed, 38 Ark. 614. See also Allen v. Maine &c. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310 and note; Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

[85] Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Wilcox v. Missouri Pac. R. R. Co., 79 Mo. App. 76; Foggan v. Lake Shore &c. R. Co., 61 Hun 623, 16 N. Y. S. 25; Bloomingdale &c. Co. v. Memphis &c. R. Co., 6 Lea. 74 Tenn. 616, 6 Am. & Eng. R. Cas. 371.

[86] M. M. Chase, The, 37 Fed. 708. See generally Robinson v. Memphis &c. R. Co., 16 Fed. 57; McVeagh v. Atchison &c. R. Co., 3 N. Mex. 205, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651; Livingston v. Miller, 48 Hun 232, 16 N. Y. S. 71; Savannah &c. R. Co. v. Wilcox, 48 Ga. 432.

[87] Crass v. Memphis &c. R. Co., 96 Ala. 447, 11 So. 480. It was also held that where the carrier's lien

where hostile claims are clearly shown and it is made to appear that there is an actual controversy a bill of interpleader is sufficient. The safe course is for the carrier to file a complaint in the nature of a bill of interpleader and secure a judgment determining the rights of the contesting parties.[88] This course may certainly be pursued in the code states, and there is, as we conceive, no valid reason why substantially the same course may not be pursued in other states.[89]

for freight is not assented to by the parties a bill of interpleader will not lie as against a party asserting his right of stoppage in transitu. See Cleveland &c. R. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480, where it is held that one who forcibly takes goods from the depot platform may be brought into a case brought against the company by the owner of the goods. We deferentially suggest that the court erred in holding that, under the code, a cross-complaint was necessary, inasmuch as where the parties are all before the court upon pleadings answered or replied to, complete relief will be awarded. Humphrey v. Thorn, 63 Ind. 296; Shattuck v. Cox, 97 Ind. 242.

[88] For decisions under the English statute see Scott v. Lewis, 2 Cromp. M. & R. 289; Allen v. Gilby, 3 Dowl. P. C. 143. Or, the carrier may deliver the property "to the party who seems best entitled to it," and take indemnity from the other party securing the carrier against loss "in case it should turn out otherwise." Hutch. Carriers (3d ed.) § 752.

[89] Shellenberg v. Fremont &c. R. Co., 45 Nebr. 487, 63 N. W. 859, 50 Am. St. 561. See also Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527, affirming 54 App. Div. 275, 66 N. Y. S. 841; Howe v. Cincinnati &c. R. Co., 10 Ohio Circ. Dec. 182. But see McGraw v. Adams, 14 How. Pr. (N. Y.) 461, a case of undoubtful soundness. See also as to procedure under Uniform Bill of Lading Act, Barnes' Fed. Code §§ 7994-7996; Act Aug. 29, 1916, Ch. 415.

CHAPTER LXXIII

CARRIERS OF LIVE STOCK

Sec.
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§ 2330 (1545.) Railroad companies are common carriers of live stock.—The earlier English reports and some of the decisions in this country contain many conflicting opinions upon the subject of the liability of railroad companies as carriers of live stock.[1] But it is now well-settled in most jurisdictions that carriers of live stock are, in a sense at least, common carriers. The rule,

[1] Louisville &c. R. Co. v. Hedger, 72 Ky. 645, 15 Am. Rep. 740; Michigan Southern R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Nashville &c. R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Baker v. Louisville &c. Co., 10 Lea (Tenn.) 304. See McManus v. Lancashire &c. R. Co., 2 H. & N. 693, 27 L. J. Exch. 201, 4 H. & N. 328; Palmer v. Grand Junction R. Co., 4 M. & W. 749; Pardington v. South Wales R. Co., 1 H. & N. 392, 396, 38 Eng. Law & Eq. 432.

as now established by the great weight of modern authority, is that railroad companies are common carriers of live stock, with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities or "proper vice" of the animals themselves.[2] In Michigan, however, it was held many

[2] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. ed. 717; South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Central R. &c. Co. v. Smitha, 85 Ala. 47, 4 So. 708; Agnew v. Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986, 61 Am. & Eng. R. 302; Summerlin v. Seaboard &c. R. Co., 56 Fla. 687, 47 So. 557, 19 L. R. A. (N. S.) 191, 131 Am St. 164; East Tenn. &c. R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741; Georgia &c. R. Co. v. Beatie, 66 Ga. 438, 42 Am. Rep. 75; St. Louis &c. R. Co. v. Dorman, 72 Ill. 504; McCoy v. Keokuk &c. R. Co., 44 Iowa 424; Kansas City &c. R. Co. v. Simpson, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; Cincinnati &c. R. Co. v. Sanders, 118 Ky. 115, 80 S. W. 488, 489 (quoting text); Chesapeake &c. R. Co. v. Magowan, 147 Ky. 422, 144 S. W. 80; Peters v. New Orleans &c. R. Co., 16 La. Ann. 222, 79 Am. Dec. 578; Sager v. Portsmouth &c. R. Co., 31 Maine 228, 50 Am. Dec. 659; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; Smith v. New Haven &c. R. Co., 94 Mass. 531, 90 Am. Dec. 166; Evans v. Fitchburg &c. R. Co., 111 Mass. 142, 15 Am. Rep. 19; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Lindsley v. Chicago &c. R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. 692; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; McFadden v. Missouri &c. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721; Keyes-Marshall Livery Co. v. St. Louis &c. R. Co., 105 Mo. App. 556, 80 S. W. 53; Ficklin v. Wabash R. Co., 117 Mo. App. 221, 93 S. W. 847; Atchison &c. R. Co. v. Washburn, 5 Nebr. 117; Church v. Chicago &c. R. Co., 81 Nebr. 615, 116 N. W. 520; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205 and note; Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Lee v. Raleigh R. Co., 72 N. Car. 236; Welsh v. Pittsburg &c. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Brown v. Oregon &c. R. Co., 63 Ore. 396, 128 Pac. 38; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Bamberg v. South Carolina R. Co., 9 S. Car. 61, 30 Am. Rep. 13; Louisville &c. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; International &c. R. Co. v. Parish, 18 Tex. Civ. App. 130, 43 S. W. 1066, 1067 (citing text); Kimball v. Rutland &c. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Virginia &c. R. Co. v. Sayers, 26 Grat. (Va.) 328; Herring v. Chesapeake &c. R. Co., 101 Va. 778, 45 S. E.

years ago in a strongly reasoned opinion that a railroad company is not a common carrier of live stock, and that decision has been steadily adhered to, notwithstanding the overwhelming weight of modern authority to the contrary.[3] The Michigan rule also seems to have been favored at one time by the courts of Kentucky,[4] and Tennessee.[5]

§ 2331 (1546.) **No liability for injuries arising from inherent nature of stock.**—It is not, perhaps, strictly correct to say that the rule that the carrier is not liable for injuries resulting from the inherent nature or propensities of the stock is an exception to the common-law rule governing the liability of common carriers, for this was the rule at common law respecting other kinds of property, as well as with respect to live stock and was frequently applied to shipments of fruit and other perishable articles.[6] But whether it should be treated as an exception to the general rule or not, it is well-settled that, although insurers in other respects to the same extent as at common law in the carriage of goods, railroad companies are not liable as insurers for losses and injuries caused to live stock by the inherent nature

322; Maslin v. Baltimore &c. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226. See also Kendall v. London &c. R. Co., L. R. 7 Exch. 373; Palmer v. Grand Junction R. Co., 4 M. & W. 749; Blower v. Great Western R. Co., L. R. 7 C. P. 655; Moffatt v. Great Western R. Co., 15 L. T. 630, 19 Cent. L. Jour. 161; Central &c. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 697, 110 Am. St. 170.

[3] Heller v. Chicago &c. R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. 541 and note; Michigan &c. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275; Smith v. Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. 440.

[4] Louisville &c. R. Co. v. Harned, 66 S. W. 25, 23 Ky. L. 1651; Cincinnati &c. R. Co. v. Greening, 30 Ky. L. 1180, 100 S. W. 825. But see Chesapeake &c. R. Co. v. Magowan, 147 Ky. 422, 144 S. W. 80; Louisville &c. R. Co. v. Pedigo, 129 Ky. 661, 113 S. W. 116.

[5] Baker v. Louisville &c. R. Co., 10 Lea (Tenn.) 308. But see Louisville R. Co. v. Dies, 7 Pick. (91 Tenn.) 177, 18 S. W. 266.

[6] Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Bamberg v. South Carolina R. Co., 9 S. Car. 61, 30 Am. Rep. 13; Louisville &c. R. Co. v. Bigger, 66 Miss. 319, 6 So. 234; Illinois Cent. R. Co. v. Brelsford, 13 Ill. App. 251; ante, § 2230.

and propensities of the animals.[7] Thus, it has been held that the carrier is not liable for the death of a bullock, which, after it has been properly fastened in the car, by its own exertions releases itself and is killed without any negligence on the part of the carrier,[8] nor for the overheating of an animal caused by its own propensities, lack of vitality or exertion,[9] nor for injuries to one animal inflicted by another where the carrier is free from fault.[10]

[7] St. Louis &c. R. Co. v. Lesser, 46 Ark. 236; Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Central of Ga. R. &c. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 42 L. R. A. (N. S.) 898, 110 Am. St. 170, 4 Ann. Cas. 128; Wabash &c R. Co. v. McCasland, 11 Ill. App. 491; Chicago &c. R. Co. v. Hostetter, 171 Ind. 465, 84 N. E. 534; Gilbert Bros. v. Chicago &c. R. Co., 156 Iowa 440, 136 N. W. 911; Wilke v. Illinois Cent. R. Co., 153 Iowa 695, 133 N. W. 746, Ann. Cas. 1913E, 308n; St. Louis &c. R. Co. v. Clark, 48 Kans. 321, 29 Pac. 312; Louisville &c. R. Co. v. Taylor, 181 Ky. 794, 205 S. W. 934; Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333; Louisville &c. R. Co. v. Bigger, 66 Miss. 319, 6 So. 234; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 So. 698; Black v. Chicago &c. R. Co., 30 Nebr. 197, 46 N. W. 428; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Penn v. Buffalo &c. R. Co., 49 N. Y. 204, 10 Am. Rep. 355; Cragin v. New York &c. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Texas &c. R. Co. v. Stribling (Tex. Civ. App.), 34 S. W. 1002; Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887; Nugent v. Smith, L. R. 1 C. P. Div. 423, 45 L. J. C. P. 697. Most of the authorities cited in the preceding note recognize this exception. See also Chicago &c. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Covington Stock Yds. Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73; Texas &c. R. Co. v. Snyder (Tex. Civ. App.), 86 S. W. 1041.

[8] Blower v. Great Western R. Co., L. R. 7 C. P. 655. See also Hall v. Renfro, 3 Metc. (Ky.) 51; Indianapolis &c. R. Co. v. Jurey, 8 Ill. App. 160.

[9] Chicago &c. R. Co. v. Owen, 21 Ill. App. 339; Maslin v. Baltimore &c. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Chicago &c. R. Co. v. Harmon, 12 Ill. App. 54. See also Kirby v. Great Western R. Co., 18 L. T. N. S. 658. But compare Toledo &c. R. Co. v. Hamilton, 76 Ill. 393; Illinois Cent. R. Co. v. Holt, 29 Ky. L. 135, 92 S. W. 540; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312.

[10] Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Louisville &c. R. Co. v. Bigger, 66 Miss. 319, 6 So. 234; Gabay v. Lloyd, 3 B. & C. 793; Conger v. Hudson River R. Co., 6 Duer (N. Y.) 375; Lawrence v. Aberdein, 5 B. & Ald. 107. But see Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772.

But, as we shall hereafter show, the carrier is liable for loss or injury caused by its own negligence, although, but for the nature or propensities of the animals no loss or injury would have resulted.[11]

§ 2332 (1547). **Duty to receive and carry.**—As railroad companies which carry live stock for hire are common carriers, it follows that they are bound to receive and carry such stock on reasonable terms for all who properly offer it for transportation, and are liable for refusal to carry without a good excuse.[12] It has been held that neither the fact that the stock was delivered to it by a connecting carrier on Sunday,[13] nor the fact that it

[11] Post, § 2333. See also Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Indianapolis &c. R. Co. v. Allen, 31 Ind. 394; Peck v. Chicago &c. R. Co., 138 Iowa 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883, 128 Am. St. 185; Kelly v. Adams Exp. Co. (Ky. App.), 119 S. W. 747; Root v. New York &c. R. Co., 83 Hun 111, 31 N. Y. S. 357; Ritz v. Pennsylvania R. Co., 3 Phila. (Pa.) 82; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Shaw v. Great Southern &c. R. Co., 8 L. R. Ir. 10. So, there are instances in which carriers have been held liable for not taking particular care of an animal which is plainly in a condition requiring it at the time it is accepted and shipped, or the like. New York &c. R. Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; McCune v. Railroad, 52 Iowa 600, 3 N. W. 615. See also post §§ 2335, 2339; Boyd v. St. Louis Exp. Co. (Mo. App.), 211 S. W. 702. But if not apparent, the shipper should inform the carrier, and the carrier is not liable for death of an animal from spinal meningitis where the carrier is not forewarned and does all that it can do after discovering the condition. Klair v. Wilmington &c. Co., 4 Pennew. (Del.) 51, 54 Atl. 694; Missouri &c. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887; Alabama &c. R. Co. v. Sparks, 71 Miss. 757, 16 So. 263; Crow v. Chicago &c. R. Co., 57 Mo. App. 135.

[12] South Alabama &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Chicago &c. R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70; Baltimore &c. R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Texas &c. R. Co. v. Nicholson, 61 Tex. 491; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776. See also ante, §§ 2201, 2213, 2217-2220; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; note in 63 Am. St. 549, 550, et seq., note in 67 Am. Dec. 213; Newport News &c. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301.

[13] Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415;

consisted of Texas cattle, the transportation of which was forbidden by an unconstitutional statute, is a good excuse.[14] But it has been held, on the other hand, that a railway company is not liable in damages by reason of its refusal to receive cattle for transportation into a county in which a license is lawfully required as a prerequisite thereto and the owner of the cattle has failed to procure such license;[15] and we suppose it would be justified in refusing to receive and carry diseased cattle likely to injure others, or cattle which it is prohibited from carrying by a constitutional and valid statute.[16] So, a railroad company would doubtless be justified in refusing or failing to carry live stock under circumstances similar to those which would justify it in refusing to receive and carry other kinds of freight.[17]

§ 2333 (1548.) Liability for negligence.—The carrier is, of course, liable for injuries caused to the live stock by its own

Guinn v. Wabash &c. R. Co., 20 Mo. App. 453.

[14] Chicago &c. R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70. See also Ft. Worth &c. R. Co. v. Masterson, 95 Tex. 262, 66 S. W. 833.

[15] Williams v. Great Western R. Co., 52 L. T. R. 250, 49 J. P. 439.

[16] See as to constitutionality of such statutes and liability of the carrier under them, Railroad Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Furley v. Chicago &c. R. Co., 90 Iowa 146, 57 N. W. 719, 23 L. R. A. 73; Missouri Pac. R. Co. v. Finley, 38 Kans. 550, 16 Pac. 951; Wilson v. Kansas City &c. R. Co., 60 Mo. 184; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638 and note, 47 Am. St. 653, 61 Am. & Eng. R. Cas. 343 and note; Coyle v Chicago &c. R. Co., 27 Mo. App. 584; Receivers of International &c. R. Co. v. Wright, 2 Tex. Civ. App. 198, 21 S. W. 56. See also Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. ed. 632; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108; United States v. Louisville &c. R. Co., 176 Fed. 942; United States v. Baltimore &c. R. Co., 222 U. S. 8, 32 Sup. Ct. 6, 56 L. ed. 68; note in 43 L. R. A. (N. S.) 1068. The carrier has been held liable for damages caused by wrongfully exposing the cattle to infection. Dorr Cattle Co. v. Chicago &c. R. Co., 128 Iowa 359, 103 N. W. 1003.

[17] See ante, §§ 2214, 2223; Paramore v. Western R. Co., 53 Ga. 383. And see as to when company is not negligent in not carrying cattle on fast train. Baltimore &c. R. Co. v. Maurer (Ind. App.), 127 N. E. 294. As to the duty to give notice of inability to furnish cars see Hines v. Mason (Ark.) 221 S. W.

negligence,[18] and this is true although the animals, owing to their natural propensities, may have contributed thereto,[19] provided their owner, or his agent, was not guilty of contributory negligence. Thus, where animals, by being overcrowded, become heated and die by reason of the negligent failure of the carrier to water and cool them, it is liable therefor, and the fact that its pump is out of order is no excuse.[20] So, where the train is delayed by a snow storm and the carrier negligently permits them to die of cold.[21] So, where the carrier negligently furnishes an

861; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 433, 5 Am. St. 226. And as to when unprecedented shortage of cars is an excuse see note in 10 A. L. R. 337-363.

[18] South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; East Tenn. &c. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489, 22 Am. & Eng. R. Cas. 437; Louisville &c. R. Co. v. Grant, 99 Ala. 325, 13 So. 599; Indianapolis &c. R. Co. v. Allen, 31 Ind. 394; German v. Chicago &c. R. Co., 38 Iowa 127; Atchison &c. R. Co. v. Ditmars, 3 Kans. App. 459, 43 Pac. 833; Leonard v. Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Oxley v. St. Louis &c. R. Co., 65 Mo. 629; Cooke v. Kansas City &c. R. Co., 57 Mo. App. 471; Louisville &c. R. Co. v. Smith, 123 Tenn. 678, 134 S. W. 866; Gulf &c. R. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785; Texas &c. R. Co. v. Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42; Virginia &c. R. Co. v. Sayers, 26 Grat. (Va.) 328; Norfolk &c. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127; Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55.

[19] New York &c. R. Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772, 27 Am. & Eng. R. Cas. 55; Betts v. Chicago &c. R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. 558; Sturgeon v. St. Louis &c. R. Co., 65 Mo. 569; Haynes v. Wabash &c. Co., 54 Mo. App. 582; Giblin v. National &c. Co., 8 Misc. 22, 28 N. Y. S. 69; Galveston &c. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129; Willoughby v. Horridge, 12 Com. B. 742, 22 L. J. C. P. 90; Loeser v. Railway Co., 94 Wis. 571, 69 N. W. 372; and authorities cited in following notes.

[20] Illinois &c. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Toledo &c. R. Co. v. Thompson, 71 Ill. 434. See also St. Louis &c. R. Co. v. Keys, 6 Ind. Ter. 396, 98 S. W. 138; Wallace v. Lake Shore &c. R. Co., 133 Mich. 633, 95 N. W. 750; Kime v. Southern Ry. Co., 160 N. Car. 457, 76 S. E. 509, 43 L. R. A. (N. S.) 617.

[21] Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33. See also Gulf &c. R. Co. v. Frost (Tex. Civ. App.), 34 S. W. 167; Chapin v. Chicago &c. R. Co., 79 Iowa 582, 44 N. W. 820; Ball v. Wabash &c.

infected car,[22] or negligently sets the bedding on fire and thus injures the stock.[23] But the fact that a railroad company did not provided any bedding for the stock has been held not to be of itself prima facie evidence of negligence on its part.[24] Although animals are injured by becoming restive, if the restiveness was caused by the negligence of the carrier it will be liable, and the carrier has been held liable in such a case, notwithstanding a stipulation in the contract for transportation that the carrier should not be liable for any accident occasioned by the restiveness of the animals.[25] So carriers have been held liable in many cases for injuries caused by defective cars, stock-pens and the like,[26]

R. Co., 83 Mo. 574. And compare Colsch v. Chicago &c. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C. 915n, and cases there cited in note.

[22] Railway Co. v. Henderson, 57 Ark. 402, 21 S. W. 878; Illinois Cent. R. Co. v. Harris, 184 Ill. 57, 56 N. E. 316, 48 L. R. A. 175. See also Shaw v. Great Southern R. Co., 8 L. R. Ir. 10; Tattersall v. National &c. R. Co., L. R. 12 Q. B. Div. 297; Chicago &c. R. Co. v. Williams, 61 Nebr. 608, 85 N. W. 832, 55 L. R. A. 289; Missouri Pac. R. Co. v. Graves, 2 Tex. App. Civ. Cas. § 676. See also notes in L. R. A. 1917C, 512, and 43 L. R. A. (N. S.) 1068.

[23] Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564. See also Holsapple v. Rome &c. R. Co., 86 N. Y. 275; Texas &c. R. Co. v. Dishman, 38 Tex. Civ. App. 277, 85 S. W. 319; St. Louis &c. R. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131.

[24] East Tenn. &c. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489, 22 Am. & Eng. R. Cas. 437. But compare where such is the custom or undertaking. Allen v. Chicago &c. R. Co., 82 Nebr. 726, 118 N. W. 655, 23 L. R. A. (N. S.) 278; Chicago &c. R. Co. v. Clements, 53 Tex. Civ. App. 143, 115 S. W. 664; Houston &c. R. Co. v. Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318. And see Kansas City &c. Ry. Co. v. Weatherby (Tex. Civ. App.), 203 S. W. 793.

[25] Moore v. Great Northern &c. R. Co., L. R. 10 Ir. 95; Gill v. Manchester &c. R. Co., L. R. 8 Q. B. 186, 42 L. J. Q. B. 89. See also Chesapeake &c. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. And compare Kime v. Southern R. Co., 160 N. Car. 457, 76 S. E. 509, 43 L. R. A. (N. S.) 617 and cases there cited in note.

[26] St. Louis &c. R. Co. v. Dorman, 72 Ill. 504; Indianapolis &c. R. Co. v. Strain, 81 Ill. 504; Smith v. New Haven &c. R. Co., 94 Mass. 531, 90 Am. Dec. 166; Great Western R. Co. v. Hawkins, 18 Mich. 427; Mason v. Missouri Pac. R. Co., 25 Mo. App. 473; Wilson v. Hamilton, 4 Ohio St. 722; Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 15 S. W.

and it has been held that where stock are suffering or become frightened or unruly, it is the duty of the company, when properly requested, to sidetrack the car where it can reasonably do so.[27]

§ 2334 (1548a.) **Burden of proof as to negligence.**—There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence.[28] There is much, however, that

568; International &c. R. Co. v. McCullough (Tex. Civ. App.), 118 S. W. 558; Gulf &c. R. Co. v. Dunman (Tex. Civ. App.), 81 S. W. 789; Gulf &c. R. Co. v. Culwell (Tex. Civ. App.), 216 S. W. 457; Chicago &c. R. Co. v. Morris, 16 Wyo. 308. 93 Pac. 664. See generally as to duties of company in regard to stock pens and yards. Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289 and note, 50 Am. St. 855; Covington Stock Yds. Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461. 35 L. ed. 73; St. Louis &c. R. Co. v. Beets, 75 Kans. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571; Louisville &c. R. Co. v. Thompson, 144 Ky. 765, 139 S. W. 939; Chicago &c. R. Co. v. Powers, 73 Nebr. 816, 103 N. W. 678 (carrier held not liable as such where stock placed in pen for future shipment); Ft. Worth &c. R. Co. v. Cage Cattle Co. (Tex. Civ. App.), 95 S. W. 705; Texas &c. R. Co. v. Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

[27] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534. But compare Illinois Cent. R. Co. v. Peterson, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550, 49 Am. & Eng. R. Cas. 171; Receivers of Inter. &c. R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236. See also Bills v. New York &c. R. Co., 84 N. Y. 5; Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162. Compare Regan v. Adams Exp. Co., 49 La. Ann. 1579, 22 So. 835, 838, 62 Am. St. 680 (quoting text).

[28] Missouri Pac. R. Co. v. Texas &c. R. Co., 41 Fed. 913; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Richmond &c. R. Co. v. Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. 69; McCoy v. Keokuk &c. R. Co., 44 Iowa 424; Chapin v. Chicago &c. R. Co., 79 Iowa 582, 44 N. W. 820; Swiney v. American Exp. Co., 144 Iowa 342, 115 N. W. 212. 122 N. W. 957; Dow v. Portland &c. Co., 84 Maine 490, 24 Atl. 945; Lindsley v. Chicago &c. R.

might be said in favor of the opposite rule, for, although the facts may sometimes be peculiarly within the knowledge of the carrier, yet, as it is well known that animals are peculiarly liable to injure themselves and each other, we think it is going very far to cast the burden upon the company to show that they were not injured by its own negligence where the plaintiff introduces no evidence to show how the injuries were inflicted or that any accident occurred to the train, or the like, and there is nothing to show that the injuries might not have been caused solely because of the inherent nature and propensities of the animals themselves. This view is not entirely without the support of authority,[29] and, as shown in another section, it generally obtains where the owner accompanies the stock, even in jurisdictions in which the burden is otherwise held to be upon the carrier.

§ 2335 (1548b.) Duty towards overheated animals—"Piling up."—It may become the duty of the carrier, where hogs in course of transportation are in danger of being overheated, to throw water over them to ameliorate their condition, and it has been held that the company is negligent where it fails to provide

Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. 692; Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; Doan v. St. Louis &c. R. Co., 38 Mo. App. 408; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19; Louisville &c. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834, 49 Am. & Eng. R. Cas. 157. See also McCrary v. Chicago &c. R. Co., 109 Mo. App. 567, 83 S. W. 82; Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; Cincinnati &c. R. Co. v. Veatch, 162 Ky. 136, 172 S. W. 89; Chicago &c. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Osborne v. Southern R. Co., 175 N. Car. 594, 96 S. E. 34.

[29] Hussey v. Saragossa, The, 3 Woods (U. S. C. C.) 380; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; International &c. R. Co. v. Smith, 1 Tex. App. (Civil Cases) 484; St. Louis &c. R. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131; Smith v. Midland R. Co., 57 L. T. R. 813; Harris v. Midland R. Co., 25 W. R. 63; Kendall v. London &c. R. Co., L. R. 7 Exch. 373. See also ante, § 2276, note 57; St. Louis &c. R. v. Piper, 13 Kans. 505; Bankard v. Baltimore &c. R. Co., 34 Md. 197, 6 Am. Rep. 321; Fulbright v. Wabash R. Co., 118 Mo. App. 482, 94 S. W. 992; Ratliff v.

water at suitable points on the line for this purpose.[30] In a case where the question was as to which of two connecting carriers was liable for the neglect to cool overheated animals it was held that the jury were authorized to assume that the neglect occurred on the line on which they were delayed at the most trying time of the day.[31] In one case a carrier was held liable for the death of a hog which it placed in a steam-heated car and the carrier by the exercise of ordinary care could have foreseen that this would have been the result and could have obviated it by placing the animal in another car.[32] Where the animals show a tendency to "pile up" and smother those underneath, it is usually the duty of the carrier, unless the shipper has expressly assumed the duty, to take measures to prevent this by unloading, if it is caused by delay, or by giving other suitable attention to the animals, and is held that the carrier can not escape liability for a neglect of this duty, on the ground that the cars were overcrowded, if the animals were accepted with knowledge of the fact.[33]

Quincy &c. R. Co., 118 Mo. App. 644, 94 S. W. 1005; Bushnell v. Wabash R. Co., 118 Mo. App. 618, 94 S. W. 1001; Robinson v. Bush, 199 Mo. App. 184, 200 S. W. 757; Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 128, 59 Atl. 1117; Peterson v. Chicago &c. R. Co., 19 S. Dak. 122, 102 N. W. 595. In Nugent v. Chicago &c. R. Co., 183 Iowa 1073, 166 N. W. 592, it is said that in order for the death of a horse in transit to make a prima facie case against the carrier so as to put on it the burden of disproving negligence, the loss must appear to have been due to human agency and not from natural causes or inherent vice. Carrier not required to show specific cause of death in Thomas v. Wells, Fargo &c. Co. (Tex. Civ. App.), 95 S. W. 723.

[30] Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Toledo &c. R. Co. v. Hamilton, 76 Ill. 393; Toledo &c. R. Co. v. Thompson, 71 Ill. 434; Wallace v. Lake Shore &c. R. Co., 133 Mich. 633, 95 N. W. 750. See also Peck v. Chicago &c. R. Co., 138 Iowa 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883, 128 Am. St. 185; Illinois Cent. R. Co. v. Holt, 29 Ky. L. 135, 92 S. W. 540.

[31] Wallace v. Lake Shore &c. R. Co., 133 Mich. 633, 95 N. W. 750.

[32] United States Express Co. v. Burke, 94 Ill. App. 29, 87 Ill. App. 505. See also Weisinger v. Southern R. Co., 33 Ky. L. 1038, 112 S. W. 660.

[33] Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772. See also Doan v. St. Louis &c. R. Co., 38 Mo. App. 408; Ritz v. Pennsylvania R. Co., 3 Phila. (Pa.) 82. But compare Cohn v. Platt, 48 Misc.

§ 2336 (1548c.) **Overpacking crates used for shipment of fowls.**—In a case where the evidence was clear that the crates for the transportation of live fowls were overpacked and that the car was well ventilated and not overheated it was held that the carrier was not negligent in receiving the crates for shipment. The court very properly took the view that the shipper, and not the carrier's servant, was expected to be expert on the question of how many fowls could be packed in a crate. The case is an application of the principle which relieves the carrier from liability for the injuries to the subject of the shipment through the negligence of the shipper in packing his goods.[34]

§ 2337 (1548d.) **Extraordinary climatic conditions.**—Applying the principle which exonerates the carrier from liability for loss of goods attributable to an act of God as explained in earlier sections,[35] it has been held that a carrier is not liable for loss or injury to live stock caused by unprecedented climatic conditions —as, for example, where animals contract pneumonia from an unusual drop in temperature—if the carrier has otherwise made such provisions for the protection of stock as are sufficient for ordinary conditions.[36] And the same doctrine has been applied in other live stock cases under similar circumstances.[37] But if the weather conditions are not unusual and should have been anticipated, or the carrier is negligent in failing to take care of the stock so as to avoid the effects of the weather, the rule stated does not apply.[38]

378, 95 N. Y. S. 535, in next following section.

[34] Cohn v. Platt, 48 Misc. 378, 95 N. Y. S. 534. See also Northwestern Marble Co. v. Williams, 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1077 and note.

[35] § 2202, et seq.

[36] Louisville &c. R. Co. v. Warfield, 30 Ky. L. 352, 98 S. W. 313. See also Gillespie v. Louisville &c. R. Co., 144 Mo. App. 508, 129 S. W. 277. But compare Sanders v. Atlantic &c. R. Co., 79 S. Car. 219, 60 S. E. 526; Fuller v. Atlantic &c. R. Co., 140 N. Car. 480, 53 S. E. 297.

[37] Colsch v. Chicago &c. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 916n; Jones v. Minneapolis &c. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; Herring v. Chesapeake &c. R. Co., 101 Va. 778, 45 S. E. 322. See also Vencill v. Quincy &c. R. Co., 132 Mo. App. 722, 112 S. W. 1030; Northern Pac. R. Co. v. Kempton, 138 Fed. 992.

[38] McCrary v. Missouri &c. R.

§ 2338 (1549.) **Rule where owner accompanies the stock.**—The fact that the owner, or his agent, is furnished transportation by the carrier and goes with his cattle or horses to look after and care for them, especially if he has agreed to do so in the contract of carriage, often exerts an important influence in determining the duties and liabilities of the carrier in the particular case. As we shall hereafter show it may relieve the carrier from the duty to feed and water and otherwise give particular attention to the stock,[39] but it will not relieve the carrier from the duty to afford the owner reasonable opportunities for so doing.[40] The fact that the owner accompanies the stock and takes charge of it may also be important upon the question of contributory negligence. So, where the owner accompanies the stock, under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts in regard to their loss or injury as the carrier, and as they may have been injured

Co., 99 Mo. App. 518, 74 S. W. 2; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Drake v. Great Northern R. Co., 24 S. Dak. 19, 123 N. W. 82; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312; Texas &c. R. Co. v. Smissen, 31 Tex Civ. App. 549, 73 S. W. 42; Texas &c. R. Co. v. Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052; Atchison &c. R. Co. v. Nation (Tex.), 92 S. W. 823. We assume here that the negligence of the carrier was a proximate cause of the loss of injury.

[39] "Of course, the carrier is relieved from special care and oversight of the animals, where the owner or his agent accompanies them for that purpose." Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333, 334, citing Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. R. 19, 3 Am. & Eng. Ency. of Law 6; Moulton v. Railroad Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781. This statement is, perhaps, a little too sweeping, as the mere fact that the shipper accompanied the stock will not necessarily relieve the shipper from liability for failing to feed and water, or the like, at least unless there is a special contract to that effect. See Gibson v. Adams Exp. Co., 187 Iowa 1259, 175 N. W. 331.

[40] Welch v. Northern Pac. R. Co., 14 N. Dak. 19, 103 N. W. 396, 397, 398 (citing text), and see post, § 2346; also Kansas City &c. R Co. v. Cliett (Tex. Civ. App.), 216 S. W. 682. As to liability of the company for injury to such person see Lake Shore &c. R. Co. v. Teeters (Ind.), 74 N. E. 1014; Houston &c. R. Co. v. Wilkins (Tex. Civ. App.), 98 S. W. 202.

because of his own negligence, or because of their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The correct rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence the burden is upon the plaintiff to show such negligence.[41] It has also been held that a railroad company is not liable as an insurer where the car in which animals are shipped is in the possession and control of their owner under a contract that he should take care of them, and that if they are injured by the act of the owner the carrier is not liable no matter whether such act was negligent or not.[42] The court further held, in the case just referred to, that even if the special contract was prohibited by statute, and therefore invalid, there could be no

[41] Southern R. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. ed. 836; St. Louis &c. R. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104, 117; Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192, 193 (citing text); Colsch v. Chicago &c. R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, 1018, Ann Cas. 1912C, 915n, 919 (quoting text); Louisville &c. R. Co. v. Hedger, 72 Ky. 645, 15 Am. Rep. 745; Louisville &c. R. Co. v. Harned, 23 Ky. L. 1651, 66 S. W. 25; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239, 55 Am. & Eng. R. Cas. 326; Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333; Zimmerman v. Northern Pac. R. Co., 140 Minn. 212, 167 N. W. 546 (citing text); Clark v. St. Louis &c. R. Co., 64 Mo. 440; Kolkmeyer v. Chicago &c. R. Co., 192 Mo. App. 188, 182 S. W. 794, 797 (citing text); McBeath v. Wabash &c. R. Co., 20 Mo. App. 445; Peterson v. Chicago &c. R. Co., 19 S. Dak. 122, 102 N. W. 595; St. Louis &c. R. Co. v. Vaughan (Tex. Civ. App.), 41 S. W. 415; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606. But see where shipper is not to ride in same car. Faust v. Chicago &c. R. Co., 104 Iowa 241, 73 N. W. 623, 65 Am. St. 454.

[42] Hart v. Chicago &c. R. Co., 69 Iowa 485, 29 N. W. 597. See also Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961. But compare Adams v. Colorado &c. R. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412; Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; McDaniel v. Chicago &c. R. Co., 24 Iowa 412; Peters v. New Orleans &c. R. Co., 16 La. Ann. 222, 79 Am. Dec. 578; Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 491, 47 Am. Rep. 781; Berry v. Chicago &c. R.

recovery.[43] But it has been held under the Carmack amendment that the initial carrier is liable notwithstanding insolvency of the connecting carrier and the fact that the shipment is accompanied by a caretaker.[44] The carrier is not generally held liable for injuries to animals due to a condition of pregnancy unless it has actual or constructive knowledge of this fact. In the absence of such knowledge the condition will be regarded as a hidden or concealed defect, and the carrier will not be charged with greater care than that ordinarily exercised in handling animals not pregnant.[45]

§ 2339 (1549a.) Care in the transportation of sick or pregnant animals.—But where the fact that the animal is in a pregnant condition is plainly apparent to the carrier, or where it is in possession of facts that would lead a reasonable person to infer this condition, then the carrier will be liable for injuries due thereto, and caused by its negligence in not handling the animal with due care under the circumstances, though not expressly informed of the fact by the shipper.[46] In one of the cases announcing this principle it is said: "It would certainly be most unreasonable to require shippers of live stock to seek the agent of the carrier and make known the physical condition of his stock, and for failure to do this discharge the carrier from all liability for negligence. As well require each passenger, upon purchasing his or her ticket, or upon boarding the train, to make known his or her physical condition, so that the carrier might exercise more care in running the train to avoid collisions or accidents from other causes."[47] In conformity with the main

Co., 24 S. Dak. 611, 124 N. W. 859; Gulf &c. R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. § 458; Galveston &c. R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298.

[43] See also Roderick v. Railroad Co., 7 W. Va. 54.

[44] Texas &c. Ry. Co. v. King (Tex. Civ. App.), 174 S. W. 336.

[45] Missouri &c. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887. See also Texas &c. R. Co. v. Felker, 44 Tex. Civ. App. 420, 99 S. W. 439.

[46] McCune v. Burlington &c. R. Co., 52 Iowa 600, 3 N. W. 615. See also Estill v. New York &c. R. Co., 41 Fed. 849, affd. 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; Harden v. Chesapeake &c. R. Co., 157 N. Car. 238, 72 S. E. 1042.

[47] McCune v. Burlington &c. R. Co., 52 Iowa 600, 3 N. W. 615.

principle it has been held that a carrier is not liable for the death of a mare due to an attack of meningitis, of which it was not forewarned, especially when it did all in its power to care for the animal after the attack.[48]

§ 2340 (1549b.) Exposure of animals to disease.—A carrier of live stock is guilty of a very culpable want of care where it knowingly and needlessly exposes animals in course of transportation to infectious diseases or delivers them in yards known to be infected. Thus, in a case where the owner of high grade hogs shipped some of them over the defendant's railroad to a fine stock show, and they died from cholera thus contracted, it was held that he did not assume the risk of the exposure of the hogs to cholera in an infected zone, though he knew of its existence, where there was no necessity for diverting the car containing the hogs into such infected zone.[49] In this case the court said: "Under his (plaintiff's) evidence there was no necessity for diverting the car into the infected zone, and, therefore, he was not required to anticipate that defendant, knowingly and in the face of his protest, would deliberately take the car into the sphere of danger. On the contrary, he had the right to expect that defendant would exercise the degree of care exacted by law of common carriers in the transportation of property, to employ all reasonable means to protect it against injury from known dangers."[50]

§ 2341 (1549c.) Duty to set aside car containing frightened animals.—It has been held that a carrier is bound to set aside a car containing frightened animals, if it can reasonably be done,

[48] Klair v. Wilmington Steamboat Co., 4 Penn. (Del.) 51, 54 Atl. 694.

[49] Council v. St. Louis &c. R. Co., 123 Mo. App. 432, 100 S. W. 57.

[50] Council v. St. Louis &c. R. Co., 123 Mo. App. 432, 100 S. W. 57. See also Dorr &c. Co. v. Chicago &c. R. Co., 128 Iowa 359, 103 N. W. 1003; Baltimore &c. R. Co. v. Dever, 112 Md. 296, 75 Atl. 352, 26 L. R. A. (N. S.) 712, 21 Ann. Cas. 169. In Missouri &c. Ry. Co. v. Williamson, 75 Okla. 36, 180 Pac. 961, it is held that if a carrier undertakes to dip cattle pursuant to quarantine regulations of the state board of agriculture and United States Bureau of Animal Industry, it owes to the owner the duty of exercising ordinary care in so doing.

where it is informed through its agents that the animals are in danger of being killed or hurt by further transportation and the owner or his agent duly makes the request.[51] An instruction to this effect was approved in the case to which reference is made. But this doctrine should be carefully limited to a proper case, although there is no doubt that it may be applied in cases where it is necessary in order to feed and water stock.[52]

§ 2342 (1550.) **Contributory negligence of owner.**—The contributory negligence of the owner of the stock will defeat a recovery by him.[53] Thus, where there was evidence tending to show that he had attached the halter to a horse in such a manner as to cause restiveness and bad temper and had failed to take off its shoes it was held that the carrier was entitled to an instruction that if the injuries complained of were caused by the negligence of the plaintiff in such particulars he could not recover.[54] So, where the owner contracts to do the loading and negligently fails to close the door of the car he can not recover for cattle killed by jumping through the open door.[55] Indeed, it has been held that where a shipper who agrees to load the stock and knows that one of the car doors is unsafe merely neglects to inform the company's agent, who has no knowledge of the fact, the shipper can not recover for the escape of cattle through

[51] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534. See ante, § 2334, note 27.

[52] See post. §§ 2347, 2348.

[53] Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358; Boaz v. Central R. &c. Co., 87 Ga. 463, 13 S. E. 711; Illinois &c. R. Co. v. Brelsford, 13 Ill. App. 251; White v. Winnisimmit Co., 7 Cush. (Mass.) 155; Pratt v. Ogdensburg &c. R. Co., 102 Mass. 557; Mobile &c. R. Co. v. Mullins, 70 Miss. 730, 12 So. 826; Hunt v. Chicago &c. R. Co., 95 Nebr. 746, 146 N. W. 986; Dudley v. Camden &c. Co., 42 N. J. L. 25, 36 Am. Rep. 501; International &c. R. Co. v. Nowaski, 48 Tex. Civ. App. 144, 106 S. W. 437.

[54] Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19. See also Richardson v. Northeastern R. Co., L. R. 7 C. P. 75; Northeastern R. Co. v. Richardson, 41 L. J. C. P. 60.

[55] Newby v. Chicago &c. R. Co., 19 Mo. App. 391; Hutchinson v. Chicago &c. R. Co., 37 Minn. 524, 35 N. W. 433. See also Bowie v. Baltimore &c. R. Co., 1 McArthur (8 D. C.) 94; Central R. Co. v. James, 117 Ga. 832, 45 S. E. 223; Chicago &c. R. Co. v. Schuldt, 66

the door.[56] But it has been held, on the other hand, that the mere fact that the shipper, or his agent, accompanies the stock,[57] or assists in loading or unloading,[58] or knows that the car or stock pens are defective,[59] will not necessarily constitute contributory negligence or relieve the carrier from responsibility.[60] If, however, the shipper selects his own car, with knowledge of the defects,[61] or having full control he negligently loads the

Nebr. 43, 92 N. W. 162; Gulf &c. R. Co. v. Taliaferro, 40 Tex. Civ. App. 388, 89 S. W. 1120, affd. in 101 Tex. 640. But compare Louisville &c. R. Co. v. Kelsey, 89 Ala. 287, 7 So. 648; Lee v. Raleigh &c. R. Co., 72 N. Car. 236; Trexler v. Baltimore &c. R. Co., 28 Pa. Super. Ct. 198.

[56] Betts v. Farmers' &c. Co., 21 Wis. 80, 91 Am. Dec. 460, followed in Miltimore v. Chicago &c. R. Co., 37 Wis. 190; Jenkins v. Chicago &c. R. Co., 41 Wis. 112.

[57] Moulton v. St. Paul &c. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781. And so held where the shipper did not accompany the stock as agreed. Schade v. Missouri Pac. R. Co., 204 Mo. App. 88, 221 S. W. 146.

[58] Combe v. London &c. R. Co., 31 L. T. R. N. S. 613. See also White v. Cincinnati &c. R. Co., 89 Ky. 478, 12 S. W. 936, 7 L. R. A. 44; Gulf &c. R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715. But compare Southern R. Co. v. Bivings, 3 Ga. App. 552, 60 S. E. 287; Missouri &c. R. Co. v. Edwards, 78 Tex. 807, 14 S. W. 607.

[59] White v. Cincinnati &c. R. Co., 89 Ky. 478, 12 S. W. 936, 7 L. R. A. 44, 42 Am. & Eng. R. Cas. 547; Peters v. New Orleans &c. R. Co., 16 La. Ann. 222, 70 Am. Dec. 578; Pratt v. Ogdensburg &c. R. Co., 102 Mass. 557; Paddock v. Missouri Pac. R. Co., 1 Mo. App. 87; Mason v. Missouri Pac. R. Co., 25 Mo. App. 473; Gulf &c. Co. v. Trawick, 80 Tex. 270, 17 S. W. 948; Galveston &c. R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255. But see Great Western R. Co. v. Hawkins, 18 Mich. 427; Chicago &c. R. Co. v. Van Dresar, 22 Wis. 511; Harris v. Northern Indiana R. Co., 20 N. Y. 232.

[60] See also Missouri &c. R. Co. v. Chittim, 24 Tex. Civ. App. 599, 60 S. W. 284; Fort Worth &c. R. Co. v. Alexander, 36 Tex. Civ. App. 297, 81 S. W. 1015; Lackland v. Chicago &c. R. Co., 101 Mo. App. 420, 74 S. W. 505; Southern Pac. Co. v. Arnett, 126 Fed. 75; Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346. The negligence of the shipper must be a proximate cause. Drake v. Great Northern R. Co., 24 S. Dak. 19, 123 N. W. 82; Ft. Worth &c. R. Co. v. Alexander, 36 Tex. Civ. App. 297, 81 S. W. 1015.

[61] Carr v. Schafer, 15 Colo. 48, 24 Pac. 873; Coupland v. Housatonic &c. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Illinois Cent. R. Co. v. Hall, 58 Ill. 409; Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Harris v. Northern Indiana R. Co., 20 N. Y.

stock,[62] or wrongfully and negligently interferes with the management of the animals during their transportation[63] and thus causes loss or injury to them he can not recover for such loss or injury. Some of the courts, however, apply this rule as to selection of the car or loading by the shipper only where the carrier does not have knowledge of the defect or improper manner of loading at the time it receives and agrees to carry the shipment.

§ 2343 (1550a.) Care as to the make-up and management of a train.—Negligence in the transportation of live stock may consist in the way the train is made up. Thus, for example, where it was established that the carrier had negligently loaded a log on a flat car, so that the end of it protruded over the end of the car in such a manner as to come in contact with a car in which horses were being shipped, the carrier was held liable in damages for injuries to the stock thus occasioned, though the injury did not occur till the cars had passed on to the line of a connecting carrier.[64] And it may be added generally that a railroad company

232; Chicago &c. R. Co. v. Van Dresar, 22 Wis. 511. But see Forrester v. Southern R. Co., 147 N. Car. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508, 15 Ann. Cas. 143; Galveston &c. R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298; Ogdensburg &c. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; John Schroeder Lumber Co. v. Chicago &c. R. Co., 135 Wis. 575, 116 N. W. 179, 128 Am. St. 1039.

[62] Powhatan, The, 21 Blatch. (U. S. C. C.) 18; Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961; Bowie v. Baltimore &c. R. Co., 1 McArthur (D. C.) 94; East Tennessee &c. R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741; Hutchinson v. Chicago &c. R. Co., 37 Minn. 524, 35 N. W. 433; Fort Worth &c. R. Co. v. Word (Tex. Civ. App.), 32 S. W. 14. See also Texas &c. R. Co. v. Edins, 36 Tex. Civ. App. 639, 83 S. W. 253; Candee v. New York &c. R. Co., 73 Conn. 667, 49 Atl. 17; Illinois Cent. R. Co. v. Rogers, 162 Ky. 535, 172 S. W. 948, L. R. A. 1915C, 1220, Ann. Cas. 1916E, 1201n; Ficklin v. Wabash R. Co., 115 Mo. App. 633, 92 S. W. 347.

[63] Roderick v. Railroad Co., 7 W. Va. 54; Lee v. Raleigh &c. R. Co., 72 N. Car. 236; Hart v. Chicago &c. R. Co., 69 Iowa 485, 29 N. W. 597; Louisville &c. R. Co. v. Gormley, 33 Ky. L. 188, 109 S. W. 346; Louisville &c. R. Co. v. Gormley, 33 Ky. L. 802, 111 S. W. 289.

[64] Galveston &c. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129. But carrier is not required, so long as it has used due care, to place cattle cars in any particular place in train. Receivers v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

is wanting in reasonable care where it fails to provide a sufficient number of trains to handle its freight and thereby so overloads the trains operated that unreasonable delay results in the transportation of cattle.[65] So, it may be liable for injuries to stock caused by negligent management of the cars, such as carelessly kicking one against another or the like.[66]

§ 2344 (1551.) Cars and appliances—Terminal charges.—As a general rule the carrier is bound to furnish suitable cars and appliances for the transportation of live stock,[67] but it is not bound to provide the "safest and best approved motive power with the best appliances in use."[68] Some of the authorities hold that the cars must be absolutely safe and sufficient,[69] but others, in stating the rule, say that they must be reasonably safe for the transportation of stock.[70] The carrier is bound to provide a

[65] Ratliff v. Quincy &c. R. Co., 118 Mo. App. 644, 94 S. W. 1005. See also Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; International &c. R. Co. v. Pool, 24 Tex. Civ. App. 575, 59 S. W. 911 (liable for injury caused by overloading).

[66] Chicago &c. R. Co. v. Calumet Stk. Farm, 96 Ill. App. 337, affd. in 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68n; Illinois Cent. R. Co. v. Kerl, 77 Mis. 736, 27 So. 993; Gulf &c. R. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785. See also Missouri &c. R. Co. v. Truckett, 2 Ind. Ter. 633, 53 S. W. 444.

[67] Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986, 61 Am. & Eng. R. Cas. 302; St. Louis &c. R. Co. v. Dorman, 72 Ill. 504; Indianapolis &c. R. Co. v. Strain, 81 Ill. 504; McDaniel v. Chicago &c. R. Co., 24 Iowa 412; Blair v. Wells Fargo &c. Co., 155 Iowa 190, 135 N. W. 615; Rhodes v. Louisville &c. R. Co., 9 Bush (Ky.) 688; Smith v. New Haven &c. R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Haynes v. Wabash R. Co., 54 Mo. App. 582; Welsh v. Pittsburg R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Berry v. Chicago &c. R. Co., 24 S. Dak. 611, 124 N. W. 859; Austin v. Manchester &c. R. Co., 16 Q. B. 600; ante, § 2227. See also Blair v. Wells Fargo & Co., 515 Iowa 190, 135 N. W. 615. A statute requiring railroad companies to furnish doubledecked cars for sheep has been held constitutional. Emerson v. St. Louis &c. R. Co., 111 Mo. 161, 19 S. W. 1113. See also George v. Chicago &c. R. Co., 214 Mo. 551, 113 S. W. 1099, 127 Am. St. 690. But compare Stanley v. Wabash &c. R. Co., 100 Mo. 435, 3 Interstate Com. 176.

[68] Illinois Cent. R. Co. v. Haynes, 63 Miss. 485; ante, §§ 2221-2224.

[69] Smith v. New Haven &c. R. Co., 12 Allen (Mass.) 531.

[70] Betts v. Chicago &c. R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A.

suitable car, having in view the usual and ordinary conduct under such circumstances of stock of the kind which it undertakes to carry in the particular instance, even though such conduct may be the result of its natural propensities, but if such a car is provided and the animals are injured because of their natural propensity to kick or otherwise conduct themselves it is not liable in the absence of negligence in some other respect.[71] It must furnish a car strong enough to transport animals that are ordinarily unruly, but not such as are unusually and extraordinarily vicious for animals of their kind,[72] at least, where it has no knowledge of that fact. It has been held that a connecting carrier is not bound to transport animals in the same car in which they were delivered to it;[73] and if it does do so it is liable for injuries caused by defects therein to the same extent as if it were its own car.[74] So, a railroad company may be liable for injuries caused by defects in its stock pens or platforms for loading and

248, 54 Am. St. 558. See also Morrison v. Philip &c. Co., 44 Wis. 405, 28 Am. Rep. 599; The Mondego, 56 Fed. 268; East Tenn. &c. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Selby v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88; Texas &c. R. Co. v. Barrow, 33 Tex. Civ. App 611, 77 S. W. 643, affd. in 101 Tex. 663.

[71] Betts v. Chicago &c. R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. 558; Southern Exp. Co. v. Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. 241; Smith v. New Haven &c. R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166. The question as to whether a suitable car was provided, where the evidence is conflicting, has been held a question for the jury. Haynes v. Wabash R. Co., 54 Mo. App. 582; Armstrong v. United States Exp. Co., 159 Pa. St. 640, 28 Atl. 448. And, where clearly defective, the fact that it is like those always used by the carrier is no defense. Leonard v. Fitchburg R. Co., 143 Mass. 307, 9 N. E. 667.

[72] Selby v. Wilmington &c. R. Co., 113 N. Car. 588, 18 S. E. 88. See also Wilson v. Hamilton, 4 Ohio St. 722.

[73] McAllister v. Chicago &c. R. Co., 74 Mo. 351; Combe v. London &c. R. Co., 31 L. T. N. S. 613. See also Morris v. Delaware &c. R. Co., 2 Interstate Com. 617.

[74] Wallingford v. Columbia &c. R. Co., 26 S. Car. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40; Combe v. London &c. R. Co., 31 L. T. N. S. 613. See also Louisville &c. R. Co. v. Dies, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. 871; Pennsylvania Co. v. Roy, 102 U. S. 452, 26 L. ed. 142; St. Louis &c. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878. And a carrier has been held liable where it assumes to transport be-

unloading stock.[75] But, as we have seen, where the shipper selects his own cars, with full knowledge of defects therein the better rule seems to be, in the absence of any statute to the contrary, that he can not complain of injuries caused by such defects, especially if he has released the carrier and assumed all risk of injuries by reason thereof.[76] There is, however, some conflict among the authorities as to whether a provision relieving the carrier from liability, even in the absence of negligence, for injuries caused by unsafe, unsuitable or defective cars, or imposing upon the shipper the duty of determining their safety and sufficiency, is valid.[77] The authorities to which we have already referred in this section in support of the rule that it is the duty of railroad companies to furnish suitable cars and equipments

yond its own line, for not delivering them to the connecting carrier in a suitable car. Eckert v. Pennsylvania R. Co., 211 Pa. St. 267, 60 Atl. 781, 107 Am. St. 571. See also Texas &c. R. Co. v. Scott (Tex. Civ. App.), 86 S W. 1065. And see further as to liability to consignee's employer where a company makes delivery of freight from a car of another company instead of from its freight house. Ladd v. New York &c. R. Co., 193 Mass. 359, 79 N. E. 742.

[75] Cooke v. Kansas City &c. R. Co., 57 Mo. App. 471; Missouri &c. R. Co. v. Woods (Tex. Civ. App.), 31 S. W. 237; Atchison &c. R. Co. v. Allen, 75 Kans. 190, 88 Pac. 966; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Chesapeake &c. R. Co. v. American &c. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

[76] See ante, §§ 2229, 2242. But it is held that the carrier can not escape the duty to furnish a proper car by exacting a contract requiring the shipper to select it, where he is induced to do so by false appearances and the carrier knows that it is unsafe. Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948.

[77] See Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Chippendale v. Lancashire &c. R. Co., 7 Eng. L. & Eq. 395; Kansas City &c. R. Co. v. Holland, 68 Miss. 351, 3 So. 516; Wilson v. New York &c. R. Co., 27 Hun (N. Y.) 149, upholding such contracts. But compare Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358; Railroad Co. v. Pratt, 22 Wall. (U. S.) 123, 22 L. ed. 827; Rhodes v. Louisville &c. R. Co., 9 Bush (Ky.) 688; Welsh v. Pittsburg &c. R. Co., 10 Ohio St. 65, 75 Am. Dec. 490; Gulf &c. R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. § 458. And see Adams v. Colorado &c. R. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412; Berry v. Chicago &c. R. Co., 24 S. Dak. 611, 124 N. W. 859; also discussion of Carmack amendment in preceding chapters.

for the transportation of live stock are those in which the liability of such companies for injuries caused by defective or unsuitable cars and the like has been determined. The rule is not, however, limited, in its application, to such cases. A railroad company which is a common carrier of live stock is also liable for loss occasioned by its refusal or failure, upon proper request, to furnish any cars at all, without a good excuse.[78] It is, in general, bound to furnish suitable cars upon reasonable notice and with reasonable diligence whenever it can do so without jeopardizing its other business.[79] But the duty is not absolute under all circumstances to furnish any particular number of cars at any particular time, in the absence of a special contract.[80] Such a carrier is also bound to furnish such suitable stock pens, cattle chutes, or other facilities for loading and unloading stock as are reasonably sufficient for the business of the place, and it has been held that where a stock yard is required under this rule, the carrier can not exact terminal charges for receiving and de-

[78] Pittsburg &c. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315, and authorities cited in following note.

[79] Newport News &c. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527; Guinn v. Wabash &c. R. Co., 20 Mo. App. 453; Harden v. Chesapeake &c. R. Co., 157 N. Car. 238, 72 S. E. 1042; Texas &c. R. Co. v. Nicholson, 61 Tex. 491; International &c. R. Co. v. Pool, 24 Tex. Civ. App. 575, 59 S. W. 911; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226, 35 Am. & Eng. R. Cas. 679; Scofield v. Lake Shore &c. R. Co., 2 Interstate Com. 67; Hazel Milling Co. v. St. Louis &c. R. Co., 3 Interstate Com. 701. And it is held in a recent case that it may lawfully contract to furnish a solid train for stock and deliver the shipment within a certain time. Gulf &c. R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968. See also Texas &c. R. Co. v. Scott (Tex. Civ. App.), 86 S. W. 1065; San Antonio &c. R. Co. v. Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; Southern Kansas R. Co. v. Morris (Tex. Civ. App.), 99 S. W. 433. But compare Chicago &c. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 501n (agreement to expedite a carload shipment of horses held unlawful discrimination under interstate commerce law).

[80] Ante, §§ 2219, 2221-2225; Richardson v. Chicago &c. R. Co., 61 Wis. 596, 21 N. W. 49, 18 Am. & Eng. R. Cas. 530; Galena &c. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574 and note; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Newport News &c.

livering the cattle through such yard in addition to its regular and legitimate charges for transportation;[81] nor can it invest another corporation with authority to impose such charges. But it is held in a somewhat recent case that a railroad company which has been accustomed to deliver cattle at the yards of a stock yard company, off of its own line, by transporting them over the stock yard company's line and paying it a fixed sum per car for the right to do so, is under no obligation to a consignee whose place of business is at the stock yard to furnish pens, chutes, or other unloading facilities at its own station in a different part of the city, and is not, therefore, bound in default of such facilities at its own station, to deliver cattle at the stock yards without a separate or additional charge, but by complying with the interstate commerce law and posting schedules, may make a separate terminal charge for delivery at the stock yards.[82] When the railroad company fails in its duty to furnish suitable yards and facilities for the delivery of live stock contracted to be

R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301. Carrier is entitled to reasonable time after request to furnish them. Lake Shore &c. R. Co. v. Anderson, 39 Ind. App. 112, 79 N. E. 381; Moore v. Baltimore &c. R. Co., 103 Va. 189, 48 S. E. 887.

[81] Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73. See also Oregon &c. R. Co. v. Ilwaco R. &c. Co., 51 Fed. 611; Coe v. Louisville &c. R. Co., 3 Fed. 775; Indian River &c. Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. 480; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Kalamazoo Hack &c. Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. 693; Flint v. Boston &c. R. Co., 73 N. H. 141, 59 Atl. 938; Keith v. Kentucky Cent. R. Co., 1 Interstate Com. 601; Rea v. Railroad Co., 7 Interstate Com. 43. But compare Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 307, 55 L. R. A. 481 (citing text and holding that it and several of the authorities cited are distinguishable from the case there under consideration).

[82] Walker v. Keenan, 73 Fed. 755. See also Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481; Central S. Y. Co. v. Louisville &c. R. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565; Interstate Com. Com. v. Chicago &c. R. Co., 186 U. S. 320, 22 Sup. Ct. 824, 46 L. ed. 1182; Central S. Y. Co. v. Louisville &c. R. Co., 118 Fed. 113, 63 L. R. A. 213. And cattle scales are not part of appliances required of the carrier in transportation, and it can not be compelled by a state Railroad Commission or similar administrative order to install them. Great Northern R. Co. v. Minnesota, 238

carried by it, it may be compelled to deliver through facilities furnished by the consignee himself.[83]

§ 2345 (1551a.) Further with reference to yards and pens.—On this subject the Supreme Court of the United States has said: "The duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provisions, at the place of loading, as will enable it to properly receive and load the stock, and such provisions at the place of unloading as will enable it to properly deliver the stock to the consignee."[84] But the rule does not require more than that the pens should be sufficient in number and size to accommodate the ordinary and usual volume of business or such business as is reasonably to be anticipated at the point in question.[85] It is required, however, that the pens should be safe, or reasonably safe, for the purpose and in one case no fault was found with a finding that pens on ground sloping to the south, with no shade, shelter or water thereon, and an embankment to the south shutting off the breeze, were not safe pens for hogs in hot weather.[86] The pens should be maintained in a safe and sanitary condition.[87] Thus, a carrier

U. S. 340, 59L. ed. 1337, 35 Sup. Ct. 753; Great Northern R. Co. v. Cabill, 253 U. S. 71, 64 L. ed. 784, 40 Sup. Ct. 457, 10 A. L. R. 1335. But compare North Carolina Corp. Com. v. Atlantic Coast Line R. Co., 139 N. Car. 126, 51 S. E. 793.

[83] Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73.

[84] Covington Stock Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73. See generally on the question of liability for disregard of this duty: Flint v. Boston &c. R. Co., 73 N. H. 141, 59 Atl. 938; Missouri &c. R. Co. v. Byrne, 3 Ind. Ter. 740, 49 S. W. 41; Mason v. Missouri &c. R. Co., 25 Mo. App. 473; Cook v. Kansas City &c. R. Co., 57 Mo. App. 471; Tracy v. Chicago &c. R. Co., 80 Mo. App. 389, 2 Mo. App. 614; Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 948; Texas &c. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; International &c. R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575; Texas &c. R. Co. v. Turner (Tex. Civ. App.), 37 S. W. 643; Texas &c. R. Co. v. Slator (Tex. Civ. App.), 102 S. W. 156; Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855.

[85] Casey v. St. Louis &c. R. Co., 37 Tex. Civ. App. 497, 83 S. W. 20.

[86] Lackland v. Chicago &c. R. Co., 101 Mo. App. 420, 74 S. W. 505.

[87] Norfolk &c. R. Co. v. Harman,

was held liable for injuries to hogs because of lime wash left in the pen, though it was placed there for disinfecting purposes by official order.[88] The duty to maintain the pens in a safe condition extends to the persons who accompany the stock as caretakers, and who, in the performance of their duties, may find it necessary to go into or through the yards.[89] It has also been held that the mere fact that the shipper knew of the unsafe and unsuitable conditions of the pens is not conclusive on the question of contributory negligence.[90] Of course, the carrier is not held to these strict rules of responsibility where the yards or pens are used by the owner of the stock by permission of the carrier before his stock is tendered for shipment. Here the carrier relation does not exist, and hence the rule making the carrier an insurer does not obtain. The liability is that of an ordinary bailment.[91]

§ 2346 (1552.) **Loading and unloading.**—We have shown, in the last two preceding sections, that it is the duty of a common carrier of live stock to provide reasonable facilities for loading and unloading the stock. It is also bound to afford the shipper reasonable opportunities to load and unload even where he assumes the duty of loading and unloading.[92] The duty to load stock rests primarily upon the carrier, but it may be imposed upon

91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855; Shaw v. Great Southern &c. R. Co., Ir. L. 8 C. L. 10; St. Louis &c. R. Co. v. Beets, 75 Kan. 295, 89 Pac. 683.

[88] Shaw v. Great Southern &c. R. Co., Ir. L. 8 C. L. 10.

[89] Atchison &c. R. Co. v. Allen, 75 Kan. 190, 88 Pac. 966.

[90] Mason v. Missouri &c. R. Co., 25 Mo. App. 473; Galveston &c. R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255; Norfolk &c. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. 855.

[91] Ft. Worth &c. R. Co. v. Riley (Tex. Civ. App.), 1 S. W. 446; Missouri &c. R. Co. v. Byrne, 100 Fed. 359; Chicago &c. R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678.

[92] Brannon v. Atlanta &c. R. Co., 4 Ga. App. 749, 62 S. E. 468; Wabash &c. R. Co. v. Pratt, 15 Ill. App. 177; Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; Louisville &c. R. Co. v. Gormley (Ky. App.), 121 S. W. 965; Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104, 30 Am. St. 534; Dunn v. Hannibal &c. R. Co., 68 Mo. 268; Bills v. New York Cent. R. Co., 84 N. Y. 5; International &c. R. Co. v. McRae, 82 Tex. 614,

the shipper by special contract.[93] If loss or injury is caused by the negligence of the shipper in such a case he can not recover therefor,[94] and so, if it is caused by his failure to comply with his contract.[95] But a railroad company must furnish proper facilities or opportunities for loading and unloading the stock and can not make a valid contract exempting itself from all liability by reason of its own negligence in that regard.[96] And so, on the

18 S. W. 672, 27 Am. St. 926; Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55. See also Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192 (citing text). But see Roberts v. Great Western R. Co., 4 C. B. N. S. 506, 27 L. J. C. P. 266.

[93] Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Dawson v. St. Louis &c. R. Co., 76 Mo. 514; Shureman v. Chicago &c. R. Co., 88 Mo. App. 183. See also St. Louis &c. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99; Candee v. New York &c. R. Co., 73 Conn. 667, 49 Atl. 17; Susong v. Florida &c. R. Co., 115 Ga. 361, 41 S. E. 566; Lewis v. Pennsylvania R. Co., 71 N. J. L. 739, 59 Atl. 1117; Bartlett v. Oregon R. &c. Co., 57 Wash. 16, 106 Pac. 487. Delivery is complete when cattle are received in the company's pens ready for shipment. Gulf &c. R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527; Deming v. Grand Trunk R. Co., 48 N. H. 455.

[94] Newby v. Chicago &c. R. Co., 19 Mo. App. 391; Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291 and note; Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961; Chicago &c. R. Co. v. Van Dresar, 22 Wis. 511. See also Bowie v. Baltimore &c. R. Co., 1 McArthur (8 D. C.) 94.

[95] Squire v. New York &c. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Penn v. Buffalo &c. R. Co., 49 N. Y. 204, 10 Am. Rep. 355. See also Owen v. Louisville &c. R. Co., 87 Ky. 626, 9 S. W. 698; and see as to the duty of the company to unload and deliver in absence of special contract, providing otherwise, Benson v. Gray, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262; Gill v. Manchester &c. R. Co., L. R. 8 Q. B. 186, 21 W. R. 525; Gordon v. Great Western R. Co., 8 Q. B. Div. 44, 3 Am. & Eng. R. Cas. 619. And compare Indiana Union Trac. Co. v. Benadum, 42 Ind. App. 121, 83 N. E. 261; Belt R. &c. Co. v. Hammond (Ind. App.), 124 N. E. 398; London &c. Fire Ins. Co. v. Rome &c. R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. 752; Penn v. Buffalo &c. R. Co., 49 N. Y. 204, 10 Am. R. 355.

[96] Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55; Norfolk &c. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127; Chesapeake &c. R. Co. v. American &c. Bank, 92 Va. 495, 23 S. E. 935.

other hand, it has been held that a contract that the shipper shall load and unload at his own risk does not deprive the carrier of the right to reasonably and justly determine when and where the exigencies of transportation may require the stock to be unloaded.[97] If the ways and means for loading are in proper condition and the shipper has assumed the duty of loading, he must have the car loaded so that the train which is to take it will not be unreasonably delayed, and if he fails to do so he can not recover as for a refusal to receive and carry the stock because the train did not wait for him to finish loading.[98] If either the shipper or the carrier voluntarily undertakes to unload the stock, or the like, he can not, ordinarily, hold the other responsible for the result of his own negligence in so doing even though it might otherwise be the duty of the other to unload and care for the stock.[99]

§ 2347 (1553.) Duty to feed, water and care for stock.—It is the duty of the carrier, where there is no special contract, to feed, water and care for stock during transportation,[1] and it has been

But compare St. Louis &c. R. Co. v. Copeland, 23 Okla. 837, 102 Pac. 104. A contract providing that the shipper shall unload at his own risk should be construed, where the shipper did not know that there were no facilities, as applying to unloading only where the company has provided proper facilities. Reynols v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883.

[97] McAlister v. Chicago &c. R. Co., 74 Mo. 351. See also Missouri &c. R. Co. v. Clark, 35 Tex. Civ. App. 189, 79 S. W. 827.

[98] Louisville &c. R. Co. v. Godman, 104 Ind. 490, 4 N. E. 163; Frazier v. Kansas City &c. R. Co., 48 Iowa 571. But see Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Alabama &c. R. Co. v. Sparks, 71 Miss. 757, 16 So. 263.

[99] Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928; San Antonio &c. R. Co. v. Dolan (Tex. Civ. App.), 85 S. W. 302; Norfolk &c. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127; Chicago &c. R. Co. v. Pollock, 16 Wyo. 321, 93 Pac. 847; Burgher v. Chicago &c. R. Co., 105 Iowa 335, 75 N. W. 192.

[1] Alabama &c. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. 119; Bryant v. Southwestern R. Co., 68 Ga. 805, 6 Am. & Eng. R. Cas. 388; Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Toledo &c. R. Co. v. Hamilton, 76 Ill. 393; Dunn v. Hannibal &c. R. Co., 68 Mo. 268; Chicago &c. R. Co. v. William, 61 Nebr. 608, 85 N. W.

held that the usage or custom of the company requiring the shipper to accompany cattle and feed and water them at his own risk and expense will not relieve it from this duty and transfer it to the shipper.[2] So, the mere fact that the company gives the shipper a pass in order that he or his servant may accompany them will not relieve it from responsibility for its failure to take proper care of them.[3] But at common law the owner may assume the duty of feeding and watering the stock and relieve the company therefrom by a valid special contract.[4] Even then, however,

832, 55 L. R. A. 289; Harris v. Northern Ind. R. Co., 20 N. Y. 232; Taff Vale R. Co. v. Giles, 23 L. J. Q. B. 43. See also Bosley v. Baltimore &c. R. Co., 54 W. Va. 563, 46 S. E. 613, 619, 66 L. R. A. 871 (citing text); Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Southern &c. R. Co. v. J. W. Burgess Co. (Tex. Civ. App.), 90 S. W. 189. And it has been held negligent for furnishing unwholesome water. Chicago &c. R. Co. v. Mitchell (Tex. Civ. App.), 85 S. W. 286. But see Cragin v. New York &c. R. Co., 51 N. Y. 61, 10 Am. Rep. 559.

[2] Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776. See also Evansville &c. R. Co. v. Young, 28 Ind. 516.

[3] Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205. See also Richmond &c. R. Co. v. Trousdale, 99 Ala. 389, 13 So. 23. And even though the owner was to go with the stock for that purpose, yet, if he fails to do so and has no one with the stock, it is held the duty of the carrier with notice thereof to feed and water. Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Groot v. Oregon &c. R. Co., 34 Utah 152, 96 Pac. 1019; Norfolk &c. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465. But when the carrier furnishes the shipper with free transportation for a caretaker who goes with the stock it is held that the carrier may rely on him to notify its agents whenever he thinks it necessary to unload or feed and water the stock. Jeffries v. Chicago &c. R. Co., 88 Nebr. 268, 129 N. W. 273.

[4] South &c. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Central R. Co. v. Bryant, 73 Ga. 722; Boaz v. Central &c. R. Co., 87 Ga. 463, 13 S. E. 711; Georgia &c. R. Co. v. Reid, 91 Ga. 377, 17 S. E. 934; Lane v. Oregon &c. R. Co. (Idaho), 189 Pac. 671; Hengstler v. Flint &c. R. Co., 125 Mich. 530, 84 N. W. 1067; Myers v. Wabash &c. R. Co., 90 Mo. 98, 2 S. W. 263; Duvenick v. Missouri Pac. R. Co., 57 Mo. App. 550; Chicago &c. R. Co. v. Schuldt, 66 Nebr. 43, 92 N. W. 162; Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 128, 59 Atl. 1117; Paul v. Pennsylvania R. Co., 70 N. J. L. 442, 57 Atl. 139; Heineman v. Grand

the carrier must furnish proper facilities to the shipper for that purpose in order to escape liability,[5] and it has been held that it is not relieved from liability by reason of a great rush of business or the like.[6] It has also been held in Texas that the carrier can not avoid liability without offering the shipper an opportunity and reasonable facilities to feed and water the stock, although he did not request it;[7] but in Michigan and Mississippi it is held than an instruction that the carrier is liable if it failed to give the shipper an opportunity to feed and water the stock is erroneous, where there is a special contract in which the shipper assumes that duty and no evidence that he requested the carrier to give

Trunk R. Co., 31 How. Pr. (N. Y.) 430; Ft. Worth &c. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525, 61 Am. & Eng. R. Cas. 322. But failure of the shipper to accompany and care for the cattle as agreed will not, it is held, relieve the company from liability for a misdelivery. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. 45. Nor from liability for injury caused by the cattle falling into a hole in an old, decayed and unsafe car. Lake Erie &c. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948. See also Spalding v. Chicago &c. R. Co., 101 Mo. App. 225, 73 S. W. 274; Chicago &c. R. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825; Millan v. Southern R. Co., 58 S. Car. 247, 36 S. E. 571. See as to unlawful discrimination by special contract where filed tariff is different. Klink v. Chicago &c. Ry. Co., 219 Fed. 457.

[5] Wabash &c. R. Co. v. Pratt, 15 Ill. App. 177; Smith v. Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. 440; Dunn v. Hannibal &c. R. Co., 68 Mo. 268; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Bills v. New York Cent. &c. R. Co., 84 N. Y. 5; Comer v. Columbia &c. R. Co., 52 S. Car. 36, 29 S. E. 637; Taylor &c. R. Co. v. Montgomery, 4 Tex. App. (Civil Cases) 401, 16 S. W. 178; Gulf &c. R. Co. v. Gann, 8 Tex. Civ. App. 620, 28 S. W. 349; Texas &c. R. Co. v. Byers (Tex. Civ. App.), 73 S. W. 427; Gulf &c. R. Co. v. Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767; Abrams v. Milwaukee &c. R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55, 61 Am. & Eng. R. Cas. 313. See also Welsh v. Northern R. Co., 14 N. Dak. 19, 103 N. W. 396; Burns v. Chicago &c. R. Co., 104 Wis. 646, 80 N. W. 927.

[6] International &c. R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323; Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Gulf &c. R. Co. v. McAulay (Tex. Civ. App.), 26 S. W. 475. See also Bills v. New York &c. R. Co., 84 N. Y. 5.

[7] Taylor &c. R. Co. v. Montgomery, 4 Tex. App. (Civil Cases) 401, 16 S. W. 178. See also Nashville

him an opportunity to do so.[8] The water must be suitable or at least not wholly unfit, for the stock to drink. Thus, it has been held that if the carrier furnishes alkaline water, knowing the stock are not accustomed to its use, it will be liable for damages resulting therefrom.[9] If, however, the carrier has provided suitable places and is free from negligence, it is not bound to have such facilities at all points and to comply with an unreasonable demand as to time and place.[10]

§ 2348 (1554.) **Statutory regulations.**—In many of the states it is provided by statute that live stock transported by railroad companies shall not be confined for a longer time than a certain period therein specified without food and water.[11] So, it is provided by act of congress that no railroad company "whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one state to another" shall confine such stock in cars for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, unless prevented from so unloading by storm or other

&c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Southern Pac. Co. v. Arnett, 126 Fed. 75.

[8] McKenzie v. Michigan Cent. R. Co., 137 Mich. 112, 100 N. W. 260; Mobile &c. R. Co. v. Francis (Miss.), 9 So. 508. See also Jeffries v. Chicago &c. R. Co., 88 Nebr. 268, 129 N. W. 273.

[9] Chicago &c. R. Co. v. Mitchell (Tex. Civ. App.), 85 S. W. 286. See also Gulf &c. R. Co. v. Dunn (Tex. Civ. App.), 78 S. W. 1080. See further as to the duty to furnish water, Toledo &c. R. Co. v. Thompson, 71 Ill. 434 (pump out of repair).

[10] St. Louis &c. R. Co. v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A. (N. S.) 546; Regan v. Adams Exp. Co., 49 La. Ann. 1579, 22 So. 835; Missouri &c. R. Co. v. Clark, 35 Tex. Civ. App. 189, 79 S. W. 827. It is held in a recent case that the duty to unload, care for and reload at rest stations may primarily rest upon the caretakers to whom transportation is furnished for that purpose. Atchison &c. Ry. Co. v. Merchants Live Stock Co., 273 Fed. 130.

[11] Other or additional statutory regulations also exist in some of the states. Most of them are referred to in 3 Am. & Eng. Ency. of Law, 16g. See also "Transportation of Live Stock," 19 Cent. L. Jour. 161, 168; note in 44 L. R. A. 449; Powers v. Chicago &c. R. Co., 130 Iowa 615, 105 N. W. 345; Grieve v. Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; Cincinnati &c. R. Co. v. Sanders, 118 Ky. 115, 80 S. W. 488.

accidental causes.[12] It is also provided that animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or, in case he fails to do so, by the railroad company, which shall have a lien thereon for food, care and custody furnished, and shall not be liable for any detention of such animals.[13] The penalty for failure to comply with the requirements of the statute is fixed at not less than one hundred nor more than five hundred dollars, to be recovered in a civil action in the name of the United States.[14] It has been held that this statute is constitutional, as being within the power of congress to regulate interstate commerce;[15] that it applies only to the carriage of animals from one state to another, and not where the shipment is from one point to another in the same state;[16] that the confinement of the entire number of animals in one shipment without unloading for rest, water and feeding in violation of the statute is a single offense, so that the

[12] U. S. Rev. St. § 4386. It is provided in another section, however, that when animals are carried in cars "in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." U. S. Rev. St. § 4388. And the statute has recently been amended, by act of June 20, 1906, so as to change the time from twenty-eight to thirty-six hours when the owner or custodian so requests the carrier in writing. See Mobile &c. R. Co. v. United States, 209 Fed. 605; Durrett v. Chicago &c. R. Co., 20 N. Mex. 114, 146 Pac. 962; Barnes' Fed. Code § 8295.

[13] U. S. Rev. St. § 4387; Barnes' Fed. Code § 8296.

[14] U. S. Rev. St. §§ 4388, 4389; Barnes' Fed. Code §§ 8298, 8299. In United States v. Harris, 85 Fed. 533, it is held that receivers appointed and acting under the orders of a federal court are not liable to such penalty. For other cases in which this statute was involved, in addition to those hereinafter referred to in this section, see Hendrick v. Boston &c. R. Co., 170 Mass. 44, 48 N. E. 835; Chicago &c. Ry. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825; St. Louis &c. R. Co. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553; Burns v. Railway Co., 104 Wis. 646, 80 N. W. 927. As to when shipper is liable for feed furnished, see Pennsylvania R. Co. v. Swift & Co., 258 Fed. 289.

[15] United States v. Boston &c. R. Co., 15 Fed. 209; United States v. Lehigh Val. R. Co., 184 Fed. 971, 187 Fed. 1006.

[16] United States v. East Tennessee &c. R. Co., 13 Fed. 642, 9 Am. & Eng. R. Cas. 259.

penalty which it prescribes can not be multiplied by the number of animals carried,[17] and that the carrier is not excused from unloading as the statute requires by reason of an accident due to its own negligence.[18] The statute does not, of course, authorize the carrier to confine the animals for twenty-eight hours without food or water if it would be negligent to do so, nor does it relieve the carrier from its common law liability to the owner in damages for injuries or loss caused by its neglect to unload them or its failure to furnish him with facilities or opportunities for so doing.[19] Indeed, it has been held that the statute gives the shipper a cause of action for damages for loss or injuries resulting from its violation, which is enforceable in the state court,[20] and that the violation of its provisions by keeping live stock upon the cars for more than twenty-eight consecutive hours, without unloading them for rest, water and feeding, is negligence per se.[21] But it has also been held that the time consumed in loading and unloading is not to be considered as a part of the confinement under

[17] United States v. Boston &c. R. Co., 15 Fed. 209.

[18] Newport News &c. Co. v. United States, 61 Fed. 488. See also Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. 87; Chicago &c. R. Co. v. Slattery, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825 (liable for failure though transportation delayed by act of God); Chesapeake &c. R. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Montana Cent. Ry. Co. v. United States, 164 Fed. 400.

[19] Missouri Pac. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692; Chesapeake &c. R. Co. v. American &c. Bank, 92 Va. 496, 23 S. E. 935, 44 L. R. A. 449; Ft Worth &c. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525. See also Missouri Pac. R. Co. v. Hall, 66 Fed. 868; St. Louis &c. R. Co. v. Piburn, 30 Okla. 262, 120 Pac. 923. As to opportunity to lie down in car at different times not being sufficient rest, see Erie R. Co. v. United States, 200 Fed. 406; Ecton v. Chicago &c. R. Co., 125 Mo. App. 223, 102 S. W. 575.

[20] Chesapeake &c. R. Co. v. American &c. Bank, 92 Va. 496, 23 S. E. 935, 44 L. R. A. 449. See also Southern Ry. Co. v. Proctor, 3 Ala. App. 413, 57 So. 513; Burns v. Chicago &c. R. Co., 104 Wis. 646, 80 N. W. 927. But see Illinois Cent. R. Co. v. Peterson, 68 Miss. 454, 10 So. 43, 14 L. R. A. 550 and note.

[21] Nashville &c. R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. 453; Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883. See also Southern Ry. Co. v. Proctor, 3 Ala. App. 413, 57 So. 513. And that

the statute,[22] that the complaint should negative the two exceptions contained in the statute,[23] and that damages can not be recovered from a railroad company for carrying cattle for more than twenty-eight hours without unloading them where there is a special contract that the shipper shall feed and water them at his own risk, and the evidence is not sufficiently specific to show how much of the damage was caused by the failure to feed and water, the cattle being in a poor condition when shipped.[24] So, where cattle were unloaded and detained twelve hours for rest, water and food in order to comply with the statute, but were reloaded and taken to their destination on the first regular train after they were unloaded it was held that the company was not liable in an action for damages resulting from the delay.[25] And it has been held that where an interstate carrier has contracted with a company owning stockyards near such carrier's line, but not on it, to unload, feed, water and rest live stock in transit, a connecting carrier which takes the stock from the through line to the yards is not responsible for delay of the stockyards company

the statute applies even though, during part of the time, the cattle were in the possession of a connecting carrier. Cincinnati &c. R. Co. v. Gregg, 25 Ky. L. 2329, 80 S. W. 512. See also Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. 87; Hale v. Missouri Pac. R. Co., 36 Nebr. 266, 54 N. W. 517; United States v. Lehigh Val. R. Co., 184 Fed. 971, 187 Fed. 1006.

[22] United States v. Northern Pac. Term. Co., 186 Fed. 947. But time spent in switching is held not part of loading or unloading. United States v. Northern Pac. Term. Co., 181 Fed. 879. See where limit expires at night. Southern Pac. Co. v. United States, 171 Fed. 360.

[23] Hale v. Missouri Pac. R. Co., 36 Nebr. 266, 54 N. W. 517. But compare United States v. Chicago &c. R. Co., 184 Fed. 984.

[24] Missouri Pac. R. Co. v. Texas &c. R. Co., 41 Fed. 913. But a special contract in violation of the Iowa statute, forbidding it, will not relieve the company from liability. Powers v. Chicago &c. R. Co., 130 Iowa 615, 105 N. W. 345.

[25] Galveston &c. R. Co. v. Warnken, 12 Tex. Civ. App. 645, 35 S. W. 72. And see as to contingencies stated in the statute, and written request required. United States v. Pere Marquette R. Co., 171 Fed. 586; Atchison R. Co. v. United States, 178 Fed. 12. The provision requiring stock to be unloaded does not apply when the animals are carried in cars in which they have proper food, water, space and opportunity to rest. Northern Pac. Ry. Co. v. Finch, 225 Fed. 676; Erie R. Co. v. United States, 200 Fed. 406.

in unloading; and receipt and transportation of the stock with due diligence to the stockyards by such connecting carrier, forming no part of the through line, is not a violation of the Twenty-Eight Hour Law, although the stock is confined longer than thirty-six hours.[25a]

§ 2349 (1555.) **Liability for delay.**—We have elsewhere considered the duty of common carriers to transport goods without unreasonable delay and their liability for negligently failing to transport and deliver goods within a reasonable time,[26] and little remains to be said upon the general subject. It is the duty of a carrier of live stock, as it is that of a carrier of goods, to forward the stock without unreasonable delay,[27] and to complete the carriage within a reasonable time.[28] If it negligently fails to do so, it will be liable for all damages naturally and proximately resulting from such neglect.[29] A delay in the shipment of cattle from

[25a] United States v. Cleveland &c. R. Co., 262 Fed. 775, citing United States v. Stockyards Terminal Ry. Co., 178 Fed. 19; United States v. Union Pac. Ry. Co., 213 Fed. 332, and other cases.

[26] Ante, §§ 2231-2238. See also Chapter on Actions by and against Carriers of Goods and Animals.

[27] Smith v. Cleveland &c. R. Co., 92 Ga. 539, 18 S. E. 977; Illinois Cent. R. Co. v. Holt, 29 Ky. L. 135, 92 S. W. 540; Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194; Leonard v. Chicago &c. R. Co., 54 Mo. App. 293; Thompson v. Quincy &c. R. Co., 136 Mo. App. 404, 117 S. W. 1193; McCrary v. Missouri &c. R. Co., 99 Mo. App. 518, 74 S. W. 2; Gulf &c. R. Co. v. McCorquodale, 71 Tex. 41, 9 S. W. 80. See also Payne v. Mallory (Ark.), 230 S. W. 270.

[28] Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Wabash &c. R. Co. v. McCasland, 11 Ill. App. 491; Cincinnati &c. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797; Tucker v. Pacific R. Co., 50 Mo. 385; Baker v. Louisville &c. Co., 10 Lea (Tenn.) 304, 16 Am. & Eng. R. Cas. 149; Gulf &c. R. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785; ante, § 2288. See also Gray v. Oregon Short Line R. Co., 32 Idaho 701, 187 Pac. 540; Ratliff v. Quincy &c. R. Co., 118 Mo. App. 644, 94 S. W. 1005; Harby v. Southern R. Co., 75 S. Car. 321, 55 S. E. 760; Ficklin v. Wabash R. Co., 117 Mo. App. 211, 93 S. W. 861; Rogers v. Texas &c. R. Co. (Tex. Civ. App.), 94 S. W. 158; Chicago &c. R. Co. v. Gillett (Tex. Civ. App.), 99 S. W. 712; St. Louis &c. R. Co. v. Gunter (Tex. Civ. App.), 99 S. W. 152; Woodford v. Baltimore &c. R. Co., 70 W. Va. 195, 73 S. E. 290.

[29] See generally Richmond &c. R. Co. v. Trousdale, 99 Ala. 389, 13

six o'clock Friday evening to four o'clock Saturday morning, whereby they arrived at their destination too late for the Saturday market has been held an unreasonable delay where the carrier had means at hand for immediate shipment.[30] But the carrier is not an insurer against delays, and a delay may be excusable or reasonable under some circumstances when it would not be under others.[31] It can not be said as a matter of law that the shipment must necessarily be made on the first train which leaves after the stock has been delivered for transportation.[32] So, it is obvious that where separate cars are required for an unusually large shipment of live stock the carrier ought not to be held liable for reasonable delay required to obtain the cars, where the shipper has not notified it in advance and is informed that there will be such delay. It has been held that a severe snowstorm, or other atmospheric conditions beyond the carrier's control will excuse a delay in shipping where the carrier is free

So. 23, 42 Am. St. 69; Missouri Pac. R. Co. v. Martindale, 139 Ark. 143, 213 S. W. 777; Boaz v. Cent. R. &c. Co., 87 Ga. 463, 13 S. E. 711; Hudson v. Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550, 61 Am. & Eng. R. Cas. 329; Louisville &c. R. Co. v. Brinley (Ky.), 29 S. W. 305; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Sturgeon v. St. Louis &c. R. Co., 65 Mo. 569; Lerum v. Chicago &c. R. Co. (S. Dak.), 172 N. W. 878; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Ayres v. Chicago &c. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226.

[30] Cincinnati &c. R. Co. v. Case, 122 Ind. 310, 23 N. E. 797, 42 Am. & Eng. R. Cas. 537. See also Baltimore &c. R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033; Minter v. Chicago &c. R. Co., 82 Mo. App. 130; Rogers v. Texas &c. R. Co. (Tex. Civ. App.), 94 S. W. 158.

[31] Ante, §§ 2232, 2233. See also San Antonio &c. R. Co. v. Turner, 42 Tex. Civ. App. 532, 94 S. W. 214; Missouri &c. R. Co. v. Kyser, 43 Tex. Civ. App. 322, 95 S. W. 747.

[32] Pennsylvania R. Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586. See also Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 128, 59 Atl. 1117. But compare Illinois Cent. R. Co. v. Waters, 41 Ill. 73. Nor, it seems, that a shipment on the next train is necessarily in time, regardless of the time when it left and of the carrier's facilities for avoiding delay. Galveston &c. R. Co. v. Tuckett (Tex. Civ. App.), 25 S. W. 150 and 670. See also St. Louis &c. R. Co. v. Vaughan, 88 Ark. 138, 113 S. W. 1035. But it seems to us that if the train ran on schedule time the shipper ought to take notice of it. As to liability where cattle are known and under-

from negligence,[33] and that a delay caused by an unusual and exceptional press of business,[34] or by a mob,[35] is not necessarily unreasonable, or such as to render the carrier liable. The carrier should, however, take proper precautions to preserve the stock from injury and loss during the delay.[36] So, if the carrier knows that there is likely to be an unusual delay because of washouts, broken bridges, press of business, or the like, it should inform

stood to be shipped for a certain market, see Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Baltimore &c. R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033; Missouri Pac. R. Co. v. Hall, 66 Fed. 868. Provision for notice of a claim on a condition precedent to recovery of damages for loss or injury to live stock does not apply where the claim is merely for loss of a favorable market by delay. McElwain v. Union Pac. R. Co., 101 Nebr. 484, 163 N. W. 845, 1 A. L. R. 533 and note.

[33] International &c. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Black v. Chicago &c. R. Co., 30 Nebr. 197, 46 N. W. 428; San Antonio &c. R. Co. v. Barnett (Tex. Civ. App.), 27 S. W. 676. See also Woodford v. Baltimore &c. R. Co., 70 W. Va. 195, 73 S. E. 290. But see Gwinn v. Wabash &c. R. Co., 20 Mo. App. 453; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527; Gulf &c. R. Co. v. McCorquodale, 71 Tex. 41, 9 S. W. 80. The text is cited with approval in Florida &c. Ry. Co. v. Peters, 72 Fla. 311, 73 So. 151, 166, Ann. Cas. 1918D, 121n; but the carrier held not excused because it did not notify the shipper where it received the freight of the circumstances likely to cause delay.

[34] Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 So. 765; ante, § 2231. See also Missouri &c. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182. But compare St. Louis &c. R. Co. v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A. (N. S.) 546; Holland v. Chicago &c. R. Co., 139 Mo. App. 702, 123 S. W. 987; Gulf &c. R. Co. v. McAulay (Tex. Civ. App.), 26 S. W. 475; Gulf &c. R. Co. v. McCorquodale, 71 Tex. 41, 9 S. W. 80.

[35] Geismer v. Lake Shore &c. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837; Louisville &c. R. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549 (strikers); Lake Shore &c. R. Co. v. Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; Sterling v. St. Louis &c. R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655. And see as to other cases where it was held that the delay was not unreasonable or was excusable. Tiller v. Chicago &c. R. Co., 142 Iowa 309, 120 N. W. 672; Louisville &c. R. Co. v. Cecil, 145 Ky. 271, 140 S. W. 186; Ratliff v. Quincy &c. R. Co., 118 Mo. App. 644, 94 S. W. 1005; San Antonio &c. R. Co. v. Turner, 42 Tex. Civ. App. 532, 94 S. W. 214.

[36] International &c. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S.

the shipper,[37] and if it expressly agrees to transport and deliver stock within a certain time it may thereby render itself liable for failure to do so, although prevented by a rush of business or some accident not the result of its own negligence.[38] This general subject is further considered, with special reference to the measure of damages in such cases, in a subsequent chapter.[39]

§ 2350 (1556.) **Liability for loss or failure to deliver.**—A carrier of live stock "must deliver the cattle to the party designated by the terms of shipment, or to his order, at the place of destination, and where it delivers them to one not entitled to receive them it is accountable."[40] The rule requiring a delivery to the right person is the same as that which applies generally to common carriers of goods.[41] As we have already treated the general subject in that connection it is sufficient at this place to give a few illustrative cases in which the question of the liability of the carrier for the loss or misdelivery of live stock was involved.

W. 622; Kansas &c. R. Co. v. West (Tex. Civ. App.), 149 S. W. 206; Feinberg v. Delaware &c. R. Co., 52 N. J. L. 451, 20 Atl. 33; Kinnick v. Chicago &c. R. Co., 69 Iowa 665, 29 N. W. 772; ante, § 2235.

[37] St. Louis &c. R. Co. v. Vaughan, 88 Ark. 138, 113 S. W. 1035; Ott v. Atchison &c. R. Co., 102 Kans. 254, 169 Pac. 957; Boyd v. King, 201 Mich. 436, 167 N. W. 901 (certiorari denied in 9 Sup. Ct. 11); Gwinn v. Wabash &c. R. Co., 20 Mo. App. 453; Holland v. Chicago &c. R. Co., 139 Mo. App. 702, 123 S. W. 987; ante, § 2236. But see Palmer v. Atchison &c. R. Co., 101 Cal. 187, 35 Pac. 630.

[38] Lake Erie &c. R. Co. v. Rosenberg, 31 Ill. App. 47; Illinois Cent. R. Co. v. Simmons, 49 Ill. App. 443; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; Gulf &c. R. Co. v. McCorquodale, 71 Tex. 41, 9 S. W. 80; International &c. R. Co. v. Ritchie (Tex. Civ. App.), 26 S. W. 840; Corbett v. Chicago &c. R. Co., 86 Wis. 82, 56 N. W. 327. But see Newport News &c. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301.

[39] See Chapter LXXXV, Actions By and Against Carriers of Goods and Animals, especially §§ 2748-2763. See also last note to § 2348, ante.

[40] North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; note to Duntley v. Boston &c. R. Co., 66 N. H. 263, 9 L. R. A. 449, 451, 49 Am. St. 610. But see Ryder v. Burlington &c. R. Co., 51 Iowa 460, 1 N. W. 747.

[41] See ante, §§ 2285, 2291. As to liability for misdelivery, see ante, § 2295.

In one of the most recent cases upon the subject it appeared that the plaintiff had agreed to load and unload the cattle and the defendant had provided necessary arrangements for unloading, feeding and reloading them at a proper place, but the carrier's servants undertook that duty, and, in performing it, negligently mixed some of the plaintiff's cattle with those belonging to another shipper and sent them to the latter, without the plaintiff's fault. It was held that the defendant was liable for the loss thus caused.[42] So, where the shipper loaded his stock into a car pointed out to him by the company's agent, and, by mistake of an employe of the company in numbering the car, it was billed to another person, and the stock lost to the plaintiff, the company was held liable.[43]

§ 2351 (1556a.) **Liability of connecting carriers in the transportation of live stock.**—It is the general rule in this country that a carrier of live stock, in the absence of some contract or statute to the contrary, is only liable for injuries that occur on its own line,[44] and, hence, it is not necessary that a stipulation that a carrier's liability shall cease on the delivery of the cattle to a connecting carrier should be supported by a consideration.[45] But where a railroad company contracts for the through carriage of cattle to a point beyond the terminus of its own line, it may be liable for injury to the cattle, or damage resulting from delay, though occurring on the line of a connecting carrier.[46] The

[42] Norfolk &c. R. Co. v. Sutherland, 89 Va. 703, 17 S. E. 127. See also Kimball v. American Exp. Co., 76 N. H. 81, 79 Atl. 492; Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928.

[43] Chicago &c. R. Co. v. Ames, 40 Ill. 249; Wilson v. Wabash &c. R. Co., 23 Mo. App. 50. See also Missouri &c. R. Co. v. Hayes, 74 Kans. 880, 88 Pac. 64. But compare Indianapolis &c. R. Co. v. Murray, 72 Ill. 128; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148.

[44] Cincinnati &c. R. Co. v. Greening, 30 Ky. L. 1180, 100 S. W. 825; Wichita Valley R. Co. v. Swenson (Tex. Civ. App.), 25 S. W. 47; Galveston &c. R. Co. v. Noelke (Tex. Civ. App.), 110 S. W. 82.

[45] Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955. See ante, §§ 2162, 2167.

[46] Ohio &c. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693. See also Panhandle &c. Ry. Co. v. Clarendon Grain Co. (Tex. Civ. App.), 215 S. W. 866.

duty of the initial and succeeding carriers, under the ordinary contract, however, is usually limited at common law to the safe transportation of the cattle over its own lines, and their proper delivery at its terminus to the next connecting road.[47] The connecting carrier should be notified of the arrival of the live stock at the point of transshipment.[48] The delivery will be regarded as complete, however, where the connecting carrier assumes control over the cattle.[49] But the initial carrier will be liable for injuries due to its own negligence, though suffered after the cattle have been delivered to the succeeding carrier, as, for example, where it furnishes an insufficient car and the animals escape or are otherwise injured,[50] and this has been held to be the case though the initial carrier attempted to limit its liability to its own line.[51] So a carrier has been held liable for resulting damages where it transferred a car of live stock to a connecting line without affording an opportunity for feeding or watering the stock, though requested to by the shipper.[52] A railroad company receiving cattle from another carrier though on Sunday is bound to forward the stock without unnecessary delay.[53] But this does not require immediate transportation on receiving the cattle. It is only required that the shipment be forwarded with reasonable diligence.[54] The initial carrier may be charged with negligence where it diverts the shipment from the route selected by the shipper. Thus, where a railroad agent shipped cattle over a certain route contrary to the express directions of the shipper, he was held guilty of misfeasance, and liable for loss occurring by

[47] East St. Louis &c. R. Co. v. Wabash &c. R. Co., 123 Ill. 594, 15 N. E. 45.

[48] Louisville &c. R. Co. v. Bourne, 16 Ky. L. 825, 29 S. W. 975.

[49] Texas &c. R. Co. v. Scoggin & Brown, 40 Tex. Civ. App. 526, 90 S. W. 521.

[50] Jones v. St. Louis &c. R. Co., 115 Mo. App. 232, 91 S. W. 158; Galveston &c. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129; Eckert v. Pennsylvania R. Co., 211 Pa. 267, 60 Atl. 781, 107 Am. St. 571.

[51] Indianapolis &c. R. Co. v. Strain, 81 Ill. 504. See also Texas &c. R. Co. v. Stephens (Tex. Civ. App.), 86 S. W. 933.

[52] Galveston &c. R. Co. v. Ivey (Tex. Civ. App.), 23 S. W. 321.

[53] Philadelphia &c. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415.

[54] Chicago &c. R. Co. v. Kapp, 37 Tex. Civ. App. 203, 83 S. W. 233.

reason of the shipment over the route selected by him[55] The presumption that the injury to the cattle occurred on the line of the last carrier[56] does not obtain in cases where the cattle were accompanied by the shipper.[57] The connecting carrier will be entitled to the benefit of the limiting value clause, where it is provided in the contract of transportation that it shall have the benefit of such valuation.[58] The rules governing connecting carriers in the transportation of cattle are not essentially different from those governing the carriage of other goods and the reader is referred to a preceding chapter giving an extended treatment of the general subject.[59]

§ 2352 (1557.) **Limiting liability.**—The carrier needs no special contract limiting its liability in respect to injuries resulting to animals from their own inherent nature or propensities.[60] In New York, where, as we have seen, a carrier is permitted to contract against liability for negligence, it has been held that, as the common-law liability of carriers is not the same in the case of live stock as in other cases, an assumption by the shipper of the risk of injury to the stock by heat must be construed to include the risk of injury by heat occasioned by the negligence of the carrier's servants in not watering and cooling the stock; otherwise the stipulation of the shipper assuming such risk could mean nothing.[61] The case to which we refer, has, however, been dis-

[55] Texas &c. R. Co. v. Eastin, 100 Tex. 556, 102 S. W. 105.

[56] Paramore v. Western R. Co., 53 Ga. 383.

[57] Texas &c. R. Co. v. Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125.

[58] Harby v. Southern R. Co., 75 S. Car. 321, 55 S. E. 760.

[59] See ante, Chap. LXVIII. As elsewhere shown, the Interstate Commerce Law as amended makes the initial carrier liable in the case of interstate shipments. See generally as to connecting carriers United States v. Chicago &c. Ry. Co., 250 Fed. 442, and last note to § 2348, ante.

[60] Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333. This follows from the rule that the carrier is not liable in such a case as an insurer in any event at common law. But such contracts are usually made, and it is well for the carrier to have such a stipulation in its contracts. See Squire v. New York Cent. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Adams Exp. Co. v. Scott, 113 Va. 1, 73 S. E. 450, Ann. Cas. 1913D, 972n.

[61] Cragin v. New York &c. R. Co., 51 N. Y. 61, 10 Am. Rep. 559.

tinguished and apparently limited in later cases in the same state,[62] and, even if good law there, it does not correctly state the rule which prevails in most jurisdictions. As a carrier of live stock is a common carrier it can no more stipulate for an exemption from liability for its own negligence in such cases than any common carrier can in any other case. It can, doubtless, stipulate against liability on account of injuries caused by the inherent nature and propensities of the live stock, but such a stipulation would generally be unnecessary. It may be that, owing to the peculiar nature of the freight, a particular stipulation limiting the liability of the carrier might be considered reasonable in the case of live stock where it would not be so considered in other cases, but in the main at least the rules governing such contracts are substantially the same as those which apply where ordinary freight is shipped under special contracts limiting liability, and the whole subject has been sufficiently treated elsewhere.[63] As

[62] See Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28. See also Bartelt v. Oregon R. &c. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. 959.

[63] See chapter LXX, particularly, § 2270. We refer, however, to a few of the more recent cases involving special contracts in regard to live stock: St. Louis &c. R. Co. v. Sharrock, 6 Ind. Ter. 458, 98 S. W. 158; St. Louis &c. R. Co. v. McNeil, 79 Ark. 470, 96 S. W. 163; St. Louis &c. R. Co. v. Butler, 82 Ark. 469, 102 S. W. 378; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986; Blatcher v. Philadelphia &c. R. Co., 31 App. D. C. 385; Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; Cooper v. Raleigh &c. R. Co., 110 Ga. 659, 36 S. E. 240; Seaboard Air Line Ry. Co. v. Pruitt, 24 Ga. App. 748, 102 S. E. 182; Parrill v. Cleveland &c. R. Co., 23 Ind. App. 638, 55 N. E. 102; Anderson v. Lake Shore &c. R. Co., 26 Ind. App. 196, 59 N. E. 396; Ward v. Chicago &c. R. Co., 87 Kans. 824, 126 Pac. 1083; Jones v. Quincy &c. R. Co., 117 Mo. App. 523, 94 S. W. 735; Bushnell v. Wabash R. Co., 118 Mo. App. 618, 94 S. W. 1001; Ratliff v. Quincy &c. R. Co., 118 Mo. App. 644, 94 S. W. 1005; Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17; Ames v. Fargo, 99 N. Y. S. 994; Nashville &c. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; Houston &c. R. Co. v. Buchanan, 42 Tex. Civ. App. 620, 94 S. W. 199. See also note in 88 Am. St. 74-134; note in 44 L. R. A. 289, et seq. And as to interstate shipments see St. Louis &c. R. Co. v. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. 99; Jones v. Louisville &c. R. Co. (Mo. App.), 182 S. W. 1064; Chicago &c. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. 325.

elsewhere shown, prior to the Cummins Amendments, a limitation of a carrier's liability in the case of an interstate shipment to a valuation agreed upon for the purpose of obtaining the lower of two alternative lawful rates could be made as to all classes of freight even where the loss or damage was due to the negligence of the carrier, the theory being that this was a lawful limitation on the amount of recovery binding on the shipper on principle of estoppel, not a contract against liability for losses resulting from the carrier's negligence.[64] But a provision in a uniform live stock agreement limiting the shipper's damages for unusual delay, caused by the carrier's negligence, to the amount actually expended by the shipper for food and water for said stock while detained was held invalid as a contract attempting to exempt the carrier practically from all liability for damages resulting from such negligence and not merely a contract limiting recovery to an agreed valuation.[65] Prior to the first Cummins Amendment, contracts providing that claims must be made within a very short designated time and that no suit should be brought after six months, or the like, were upheld, as elsewhere shown in cases of all kinds of shipments, and very recent decisions to the same effect have been rendered by the Supreme Court of the United States in the case of live stock shipments made prior to the Cummins Amendment.[66] But that amendment prohibits any

[64] Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257n; Cleveland &c. R. Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. ed. 453; Atchison &c. R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. ed. 901.

[65] Boston & Maine R. Co. v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. ed. 820, Ann. Cas. 1918E, 469. (Also holding that the fact that the form of the agreement was on file with the Interstate Commerce Commission did not make this provision valid or enforceable).

[66] Texas &c. Ry. Co. v. Leatherwood, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. ed. 1096; Erie R. Co. v. Shuart, 250 U. S. 465, 39 Sup. Ct. 519, 63 L. ed. 1088. In the first case above cited four of the justices also took the view that although a connecting carrier insists as a condition of carrying the shipment further that the shipper shall accept and sign a new bill of lading, the carrier may rely on a provision of the original bill limiting the time for bringing suit, though the bill of lading it is said did not contain any such limitation. Two other justices did not deem this necessary to a decision and the rest dissented.

shorter limitation than ninety days for giving notice, four months for filing claims, and two years for instituting suits; and it also provides that if the loss or damage was due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, no notice or filing of claim shall be required as a condition precedent to recovery,[67] and the second Cummins Amendment, which permits certain limitations as to property other than baggage and live stock, expressly excepts "ordinary live stock," which is defined to include "all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other uses." This leaves the carrier liable under the other amendments for the full actual loss, damage, or injury caused by it to ordinary live stock "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in the receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission," and any such limitation, without respect to the manner or form in which it is sought to be made, is declared to be unlawful and void.[68]

In the second case cited the condition limiting time for written claim of loss was held applicable as to any liability of carrier arising from beginning to end of transportation and the transportation was held not complete where horses were injured by a car pushed against their car while being unloaded by the shipper at a cattle chute owned and operated by the carrier.

[67] Missouri Pac. Ry. Co. v. Martindale, 139 Ark. 143, 213 S. W. 777; Conover v. Wabash Ry. Co., 208 Ill. App. 105. See Act Feb. 28, 1920, ch. 91, §§ 434-435; Barnes' Fed. Code, 1921 Supp. § 7976.

[68] In Wilson v. Adams Express Co., 72 Pa. Super. Ct. 384, it is held that Act of August 9, 1916 modifies Cummins' Amendment so that a carrier may limit its liability as to certain kinds of property, including animals other than ordinary live stock, and that a race horse is such an animal.

CHAPTER LXXIV

FREIGHT CHARGES AND DEMURRAGE

Sec.

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§ 2360 (1558.) **Generally.**—The right to remuneration or compensation in some form is one of the distinguishing marks of a common carrier and is essential in order to render it liable as such rather than as a mere gratuitous bailee.[1] A common carrier, therefore, has the right to make reasonable charges for its services and the responsibility and risks it takes upon itself in the carriage of goods. It has been held that such charges, or "freight," as they are sometimes called, may be demanded in advance and that payment thereof may be made a condition of the acceptance and carriage of the goods.[2] And it is held that this right exists under

[1] Central &c. R. Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; Citizens' Bank v. Nantucket &c. Co., 2 Story (U. S. C. C.) 16; Kirtland v. Montgomery, 1 Swan (Tenn.) 452; Place v. Union Exp. Co., 2 Hilt. (N. Y.) 19.

[2] Allen v. Cape Fear &c. R. Co., 100 N. Car. 397, 6 S. E. 105, 35 Am. & Eng. R. Cas. 532; Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 774; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; Central &c. R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457; Pickford v. Grand Junction R. Co., 8 M. & W. 372; Bastard v. Bastard, 2 Shower 81. See also Brown v. Grand Trunk

the interstate commerce act as well as at common law.[3] But the right to prepayment of charges will be regarded as waived if the carrier accepts the goods for transportation without exacting payment in advance.[4] And, in such cases, unless there is some agreement to that effect, the general rule is that it is not payable until the goods are delivered, or ready to be delivered to the person having the right to receive them,[5] and that the carrier is entitled to freight only on the goods which it delivers.[6] If it loses part of the goods it may still be entitled to freight on those which it delivers, but not upon those which it has lost and failed to

Ry., 159 Mich. 565, 124 N. W. 528, 29 L. R. A. (N. S.) 840n; Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291.

[3] Little Rock &c. R. Co. v. St. Louis &c. R. Co., 63 Fed. 775, 26 L. R. A. 192; Gulf &c. R. Co. v. Miami Steamship Co., 86 Fed. 407; Oregon &c. R. Co. v. Northern Pac. R. Co., 61 Fed. 158; Gamble-Robinson Com. Co. v. Chicago &c. R. Co., 168 Fed. 161, 21 L. R. A. (N. S.) 982n, 16 Ann. Cas. 613. See also Southern &c. Express Co. v. United States Exp. Co., 88 Fed. 659. But compare Hocking Val. R. Co. v. United States, 210 Fed. 735; Adams Express Co. v. State, 161 Ind. 328, 67 N. E. 1033 (under the Indiana statute against discrimination). See also Atlanta &c. R. Co. v. Horne, 106 Tenn. 73, 59 S. W. 134; Wadley Southern & R. Co. v. Georgia, 235 U. S. 651, 35 Sup. Ct. 214, 59 L. ed. 405; affirming 137 Ga. 497, 73 S. E. 741.

[4] Gratiot Street Warehouse Co. v. Missouri &c. R. Co., 124 Mo. App. 545, 102 S. W. 11. See also Grand Rapids &c. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385. But under the later lawful discrimination either to require prepayment in one case and not in another, or to waive it in favor of one where the schedule provides for prepayment.

[5] Brittan v. Barnaby, 21 How. (U. S.) 527, 538, 16 L. ed. 177. See also Wilson v. Grand Trunk R. Co., 56 Maine 60, 96 Am. Dec. 435; Columbus Southern R. Co. v. Woolfolk, 94 Ga. 507, 20 S. E. 119; Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296; Grand Rapids &c. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. 385; China &c. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. 576; East Tenn. &c. R. Co. v. Hunt, 15 Lea (Tenn.) 261; Barnes v. Marshall, 18 Q. B. 388.

[6] New York Cent. &c. R. Co. v. Standard Oil Co., 87 N. Y. 486; Cottrell v. Carolina &c. R. Co., 141 N. Car. 383, 54 S. E. 288, and authorities cited in the following note. But see where the owner waives full delivery or is in fault. Adams &c. Co. v. Haught, 14 Tex. 243; Brown v. Ralston, 4 Rand (25 Va.) 504. It is held that the carrier may lawfully refuse to deliver the goods

deliver.[7] In this country the owner, when sued for the freight, may generally set up any breach of its contract by the carrier and have the damages resulting therefrom applied in reduction of its claim.[8] In England, however, it seems that the carrier is entitled to its full freight upon delivery of the goods, even though they may have been damaged by its fault, and the owner can only

until the transportation charges are paid. Yazoo &c. R. Co. v. Picher Lead Co. (Mo. App.), 190 S. W. 387; Sutton v. St. Louis &c. R. Co., 159 Mo. App. 685, 140 S. W. 76. See also Pittsburgh &c. R. Co. v. Fink, 250 U. S. 577, 63 L. ed. 1151, 40 Sup. Ct. 27.

[7] Brig Collenberg, The, 1 Black (U. S.) 170, 17 L. ed. 89; Tangier, The, 32 Fed. 230; Gibson v. Brown, 44 Fed. 98; British &c. Co. v. Southern Pac. Co., 55 Fed. 82; Price v. Hartshorn, 44 Barb. (N. Y.) 655; Gibson v. Sturge, 10 Exch. 622; London Transp. Co. v. Trenchmann (1904), 1 K. B. 635. Unless prevented by the owner or party by whom the freight is payable. Meissner v. Brun, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496; Wood v. Hubbard, 62 Fed. 753; Gage v. Maryland Coal Co., 124 Mass. 442; Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354, and numerous authorities cited in the opinion. There are, however, cases in which, by its own act, it may lose its right to any part of the charges. Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 173; Cito, The, L. R. 7 P. Div. 5. So. generally, no freight can be collected if delivery of part is not accepted and the freight is not payable in a gross sum. Sayward v. Stevens, 3 Gray (Mass.) 97; One Hundred &c. Tons of Coal, 9 Ben. (U. S. C. C.) 400; Clark v. Masters, 1 Bosw. (N. Y.) 177; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177; And the particular contract may entitle the carrier to a lump sum as freight, even though part of the goods are lost. Queensware, The, 53 Fed. 1022. See also Portland Flouring Mills Co. v. Insurance Co., 130 Fed. 860; Christie v. Davis Coal &c. Co., 95 Fed. 837. Not entitled to freight on goods which it abandons or converts. Frazier v. Atchison R. Co., 104 Mo. App. 355, 78 S. W. 679; Railroad Co. v. Nieman, 84 Ill. App. 272; China Insurance Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. 576; James Martin, The, 88 Fed. 649.

[8] Page v. Munro, 1 Holmes (U. S. C. C.) 232; Success, The, 7 Blatch. (U. S. C. C.) 551; Tangier, The, 32 Fed. 230; Aldrich v. Cargo, 117 Fed. 757; Boggs v. Martin, 13 B. Mon. (Ky.) 239; Hill v. Leadbetter, 42 Maine 572, 66 Am. Dec. 305; Fitchburg &c. R. Co. v. Hanna, 72 Mass. 539, 66 Am. Dec. 427; Strong v. Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184; Gleadell v. Thomson, 56 N. Y. 194; Leech v. Baldwin, 5 Watts (Pa.) 446; Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350; La Motte v. Angel, 11 Hawaiian 136. See also Miami Powder Co. v. Port

recover for his loss in a separate action.[9] Although the carrier may be held liable in a proper case for loss or injury to the goods, if it carries them and is ready to deliver them it is entitled to its freight even though they have become worthless, from internal causes or other causes for which it is not responsible.[10] So, if it loses the goods, but pays their full value, it is entitled to have the freight deducted,[11] and in an action against it for damages caused by loss or injury to the goods the plaintiff can not recover freight which he has paid, and if he has not paid it, the carrier is usually entitled to have it deducted.[12]

Royal R. Co., 47 S. Car. 324, 25 S. E. 153, 58 Am. St. 880; Missouri &c. R. Co. v. Peru Van Zandt Implement Co., 73 Kans. 295, 85 Pac. 80, 6 L. R. A. (N. S.) 1058n, 117 Am. St. 468, 9 Ann. Cas. 790; Moran v. Northern &c. R. Co., 19 Wash. 266, 53 Pac. 49, 1101.

[9] Dakin v. Oxley, 15 Com. B. (N. S.) 646. It is said that a set-off is now permitted in England under a recent statute. 8 Am. & Eng. Ency. of Law, 977.

[10] Seaman v. Adler, 37 Fed. 268; Griswold v. New York Ins. Co., 3 Johns (N. Y.) 321, 3 Am. Dec. 490; McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Jordan v. Warren Ins. Co., 1 Story (U. S. C. C.) 342. See also Dakin v. Oxley, 15 Com. B. (N. S.) 646; Galt v. Archer, 7 Grat. (48 Va.) 307. But see Missouri Pac. R. Co. v. Peru Van Zandt Implement Co., 73 Kans. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058n, 117 Am. St. 468, 9 Ann. Cas. 790, which holds that where a common carrier negligently delays the delivery of freight so that the damages occasioned by the delay exceed the amount of freight due on the goods, the consignee may demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession on such demand amounts to a conversion. But compare Willensky v. Central of Georgia R. Co., 136 Ga. 889, 72 S. E. 418, Ann. Cas. 1912D, 271, and see note.

[11] Bazin v. Liverpool &c. S. S. Co., 3 Wall, Jr., 229, 20 Law R. 129, 5 Am. L. Reg. 459; Arthur v. Cassius, The, 2 Story (U. S. C. C.) 81; Knox v. Ninetta, The, Crabbe (U. S. C. C.) 534; Hammond v. McClures, 1 Bay (S. Car.) 99. See also Hill v. Leadbetter, 42 Maine 572, 66 Am. Dec. 305. And a carrier not in fault has also been held entitled to full freight if prevented from completing the carriage by the act of the owner; Gazelle, The, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496; Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354.

[12] Galveston &c. R. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Gulf &c. R. Co. v. Kemp (Tex. Civ. App.), 30 S. W. 714; Michigan &c. R. Co. v. Caster, 13 Ind. 164; Massachusetts &c. Co. v. Fitchburg &c. R. Co., 143 Mass. 318, 9 N. E. 669;

§ 2361 (1559.) Who is liable for freight charges.—In the absence of anything to the contrary the consignee is presumed to be the owner of goods shipped to him and is prima facie liable for the freight, so that if he accepts them the law implies a promise on his part to pay it.[13] But the presumption that the consignee is the owner and liable for the freight is rebuttable, and if he is not the owner and refuses to accept the goods no promise on his part to pay the freight can be implied from the mere fact that they

Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S. C. C.) 403. But compare Bamberg v. South Carolina R. Co., 9 S. Car. 61, 30 Am. Rep. 13; Louisville &c. R. Co. v. Craycraft, 12 Ind. App. 203, 39 N. E. 523.

[13] Philadelphia &c. R. Co. v. Barnard, 3 Ben. (U. S. C. C.) 39; Irzo v. Perkins, 10 Fed. 779; Gates v. Ryan, 37 Fed. 154; North German Lloyd v. Heule, 44 Fed. 100, 10 L. R. A. 814; Taylor v. Ironworks, 124 Fed. 826; Dayton v. Parke, 67 Hun. 137, 22 N. Y. S. 613; Merrick v. Gordon, 20 N. Y. 93; Abbe v. Eaton, 51 N. Y. 410 (though not named as consignee in bill of lading); Davison v. City Bank, 57 N. Y. 81; Wegener v. Smith, 15 Com. B. 285; Cock v. Taylor, 13 East 399; Sanders v. Vanzeller, 4 Q. B. 260. But see Ewell v. Skiddy, 77 N. Y. 282. And the consignee who takes the goods and pays less than the charges fixed by law is prima facie at least liable for the difference. Mobile &c. R. Co. v. Laclede Lumber Co., 202 Mo. App. 630, 216 S. W. 798. See also Pittsburgh &c. Ry. Co. v. Fink, 250 U. S. 577, 63 L. ed. 1151, 40 Sup. Ct. 27 (consignee liable for difference that paid and amount fixed by filed tariff rate, under interstate commerce law); King v. Slack, 193 Mich. 15, 159 N. W. 157. But compare Pennsylvania R. Co. v. Townsend, 90 N. J. L. 75, 10 Atl. 855. So, custom and the previous course of dealing between the parties may give rise to an implication that the consignee is to pay the freight. Wilson v. Kymer, 1 M. & S. 157. And ownership is generally the test for determining who is liable where there are intermediate consignees. Spencer v. White, 1 Ired. L. 236; Dart v. Ensign, 47 N. Y. 619; Canfield v. Northern R. Co., 18 Barb. (N. Y.) 586. In Massachussetts, however, it is held in a recent case "when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence, and if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real

are consigned to him.[14] So, much may depend upon the contract showing the intention of the parties in the particular instance.[15] And there are many cases in which the consignor has been held liable to the carrier where the consignee refused to accept or the like.[16] So, if the consignee assigns the bill of lading before the goods are delivered to him his indorsee, by accepting them, usually becomes liable, and the carrier, by delivering them to the latter, releases the consignee unless the indorsee received them as the consignee's agent.[17] The carrier's remedy against the consignee, even where he might be held liable for the freight as owner

principal in the contract." Union Freight R. Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398, 55 Am. & Eng. R. Cas. 695. Compare Old Colony R. Co. v. Wilder, 137 Mass. 536. See generally as to where shipper is liable and where consignee and which must make good the difference between schedule rate and amount collected, notes in 49 L. R. A. (N. S.) 92, and 52 L. R. A. (N. S.) 398.

[14] Miner v. Norwich &c. R. Co., 32 Conn. 91; Boston &c. R. Co. v. Whitcher, 1 Allen (Mass.) 497; Central R. Co. v. McCartney, 68 N. J. L. 165, 52 Atl. 575; Hipsdell v. Weed, 5 Denio (N. Y.) 172; Davis v. Pattison, 24 N. Y. 317; Elwell v. Skiddy, 77 N. Y. 282; Coleman v. Lambert, 5 M. & W. 502; Scaife v. Tobin, 3 B. & Ad. 523; Amos v. Temperley, 8 M. & W. 798; Spencer v. White, 1 Ired. L. 236. But see Sheets v. Wilgus, 56 Barb. (N. Y.) 662. A bill of lading directing goods to be delivered to one person for the use of another vests the title in the latter. Grove v. Brien, 8 How. (U. S.) 429, 12 L. ed. 1142.

[15] See Boston &c. R. Co. v. Whitcher, 1 Allen (Mass.) 497; Myers v. Queensmore, The, 53 Fed. 1022. Or the previous course of dealing. Wilson v. Kymer, 1 M. & S. 157.

[16] Holt v. Westcott, 43 Maine 445, 69 Am. Dec. 74; Wooster v. Tarr, 8 Allen (Mass.) 270, 85 Am. Dec. 707; Spencer v. White, 23 N. Car. 236; Central R. Co. v. McCartney, 68 N. J. L. 165, 52 Atl. 575; Barker v. Havens, 17 Johns (N. Y.) 234, 8 Am. Dec. 393; Hayward v. Middleton, 3 McCord (S. Car.) 121, 15 Am. Dec. 615. See also Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749, Ann. Cas. 1916B, 1217n; Chicago &c. R. Co. v. Queenan, 102 Nebr. 391, 167 N. W. 410, L. R. A. 1918D. 946; Great Northern Ry. Co. v. Hocking Val. &c. Co., 166 Wis. 465, 166 N. W. 41.

[17] Tobin v. Crawford, 5 M. & W. 235; Cock v. Taylor, 13 East. 399. For cases of such agency, see Amos v. Temperley, 8 M. & W. 798; Spencer v. White, 1 Ired. L. 236; Boston &c. R. Co. v. Whitcher, 1 Allen (Mass.) 497; Miner v. Norwich &c. R. Co., 32 Conn. 91; Dart v. Ensign, 47 N. Y. 619.

of the goods, is not necessarily exclusive. If the shipper contracts in his own behalf it is but just to hold him liable, especially where the consignee refuses to accept the goods and pay the freight, and it has been held that the carrier is not obliged to collect the freight from the consignee even under a bill of lading containing the clause, "he paying the freight thereon."[18]

§ 2362 (1560.) **Amount of compensation.**—The general rule is that a common carrier is bound to carry for all for a reasonable compensation, or, as is sometimes said, at a reasonable rate.[19]

[18] Great Western R. Co. v. Bagge &c. Co., L. R. 15 Q. B. Div. 625, 23 Am. & Eng. R. Cas. 715. See also Ward v. Felton, 1 East 507; Portland Flouring Mills v. Insurance Co., 130 Fed. 860; Miner v. Norwich &c. R. Co., 32 Conn. 91; Holt v. Westcott, 43 Maine 445, 69 Am. Dec. 74; Blanchard v. Page, 8 Gray (Mass.) 281; Wooster v. Tarr, 90 Mass. 270, 85 Am. Dec. 707; Central R. Co. v. McCartney, 68 N. J. L. 165, 52 Atl. 575; Barker v. Havens, 17 John. (N. Y.) 234, 8 Am. Dec. 393; Jobbitt v. Goundry, 29 Barb. (N. Y.) 509; Thomas v. Snyder, 39 Pa. St. 317; Hayward v. Middleton, 3 McCord (S. Car.) 121, 15 Am. Dec. 615; Montpelier &c. R. Co. v. Macchi, 74 Vt. 403, 52 Atl. 960; Montpelier &c. R. Co. v. Bianchi (Vt.), 113 Atl. 534; Shepard v. De Bernales, 13 East 565; Spencer v. White, 1 Ired. L. 236; Union Freight Co. v. Winkley, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398 (consignor not liable as matter of law in this case). As shown in some of these cases, however, the carrier may forfeit this right against the consignor by making a new contract with the consignee or the like. In Chicago &c. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073, L. R. A. 1918D, 158, Ann. Cas. 1918E, 456n, the consignor is held primarily liable to the carrier for the freight, but if the consignee accepts and pays part of it he is liable for the balance where the consignor is insolvent and the carrier had no knowledge of any other arrangement between consignor and consignee. See also Pennsylvania R. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862n. But compare Yazoo &c. R. Co. v. Zemurray, 238 Fed. 789; Central of Ga. R. Co. v. Southern &c. Concrete Co., 193 Ala. 108, 68 So. 981. Ann. Cas. 1916E, 376; Central R. Co. v. McCartney, 68 N. J. L. 165, 52 Atl. 575. And see generally Emerson v. Central of Ga. R. Co., 196 Ala. 280, 72 So. 120, L. R. A. 1916F, 120; Atchison &c. R. Co. v. Stannard & Co., 99 Kans. 720, 162 Pac. 1176, L. R. A. 1917C, 1124n.

[19] Tift v. Southern R. Co., 138 Fed. 753, 148 Fed. 1021; Chicago &c. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. 278; Illinois &c. R. Co. v. Beaird, 24 Ill. App. 322; Cook v.

The fact that some one else is charged less for similar services may be evidence tending to show that a charge is unreasonable, but it would seem that "charging another person too little is not charging you too much,"[20] and that it does not necessarily follow that the rate is unreasonable merely from the fact that some one else is given a lower rate. The authorities, however, are conflicting upon this subject, and many of them, hold that this is unjust discrimination of which an injured party has a right to complain. We shall refer to them hereafter, when we come to consider the subject of discrimination. It is said in an English case that, at common law, the question as to the reasonableness of freight charges is for the court,[21] but, however this may be when there is a question as to unjust discrimination or the violation of a

Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512; New England Ex. Co. v. Maine Cent. R. Co., 57 Maine 188, 9 Am. L. Reg. (N. S.) 728 and note; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684, 9 Am. & Eng. R. Cas. 201; Scott v. Midland R. Co., 33 U. C. Q. B. 580; Harris v. Packwood, 3 Taunt. 264; ante, §§ 2213, 2216.

[20] Per Crompton, J., in Garton v. Bristol &c. R. Co., 1 B. & S. 112, 154; Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; Cowden v. Pacific &c. Co., 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. 142. See also ante, § 2216. Anniston v. So. Ry., 145 Ala. 351, 40 So. 965; Hopper v. Chicago Ry. Co., 91 Iowa 639, 60 N. W. 487. Evidence of such other charges has been held admissible, though not conclusive. Kindel v. Colo. &c. R. Co., 57 Colo. 1, 139 Pac. 1105, Ann. Cas. 1916A, 57n. See also Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 15 Am. St. 108. As to necessity of conforming to published tariff or rate fixed by railroad commission, see and compare Missouri &c. R. Co. v. Trinity &c. Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290; St. Louis &c. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634; Texas &c. R. Co. v. Texas &c. R. Co., 35 Tex. Civ. App. 387, 80 S. W. 567; Wells Fargo Exp. Co. v. Williams (Tex. Civ. App.), 71 S. W. 314; Thompson v. San Antonio &c. R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427; Southern Ry. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144.

[21] Gard v. Callard, 6 M. & S. 69. See also Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841, 2 Inters. Com. 56, 34 Am. & Eng. R. Cas. 322; Chicago &c. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Chicago &c. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. 278.

statute by charging an unreasonable rate, we suppose that, where no such question is involved, the amount of compensation to which the carrier is entitled in any particular case is usually for the jury to determine.[22] In such cases, if the rate has been fixed by a lawful contract, it must of course prevail,[23] and if the shipper has no other outlet and the carrier demands and forces him to pay a higher rate than that agreed upon, the shipper may nevertheless ship his goods and recover back the excess of freight above the contract price.[24] If there is no express contract, the

[22] Florida &c. Ry. Co. v. State, 77 Fla. 571, 82 So. 136.

[23] Blackshere v. Patterson, 72 Fed. 204. See Smith v. Findley, 34 Kans. 316, 8 Pac. 871; Memphis &c. Packet Co. v. Abell, 17 Ky. L. 191, 30 S. W. 658; Baldwin v. Liverpool &c. S. S. Co., 74 N. Y. 125, 30 Am. Rep. 277; Texas &c. R. Co. v. Texas &c R. Co., 35 Tex. Civ. App. 387, 80 S. W. 567. As to requisites of such a contract and when it exists, see Hartford &c. R. Co. v. Jackson, 24 Conn. 514, 63 Am. Dec. 177 (mistake preventing meeting of minds); Rowland v. New York &c. R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. 175; Gulf &c. R. Co. v. Dawson (Tex. Civ. App.), 24 S. W. 566; Thompson v. San Antonio &c. R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427; Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144. In Dillingham v. Labatt (Tex. Civ. App.), 30 S. W. 370, it was held that although the carrier had given a certain rate, which was not accepted, it could charge a higher rate which was allowed by law when the goods were shipped some time afterwards.

[24] Chicago &c. R. Co. v. Chicago &c. Coal Co., 79 Ill. 121; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434; Atchison &c. R. Co. v. Miller, 16 Nebr. 661, 21 N. W. 451; Baldwin v. Liverpool &c. Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277. See also Peters v. Railroad Co., 42 Ohio St. 275, 51 Am. Rep. 814; Clegg v. Southern R. Co., 135 N. Car. 148, 47 S. E. 667, 65 L. R. A. 717; Moran v. Northern R. Co., 19 Wash. 266, 53 Pac. 49, 1101; Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320. As the freight rate of an interstate shipment must be that filed with the Interstate Commerce Commission, the carrier is not estopped by accepting a lower rate from demanding the lawful rate, and where its agent inadvertently charges a lower rate the carrier may recover the amount of the deficit. Western Ry. v. Collins, 201 Ala. 455, 78 So. 833. See also Cleveland &c. Ry. Co. v. Stannard & Co., 99 Kans. 720, 162 Pac. 1176, L. R. A. 1917C, 1124n; Chicago &c. Ry. Co. v. Greenberg, 139 Minn. 428, 166 N. W. 1073, L. R. A. 1918D, 158, Ann. Cas. 1918E., 456n; New York &c. R. Co. v. York &c. Co., 215 Mass. 36, 102 N. E. 366; Kansas City So. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57

law implies a contract to pay a reasonable compensation, which is usually determined by established usage,[25] or the amount commonly and customarily charged and paid for like services under like conditions.[26] "Further than that his charges shall be reasonable," says a well-known text-writer, "the common law seems to have put no restrictions upon the carrier in respect to his demand for compensation, and what is a reasonable charge can, of course, be fixed by no particular rule, but must be determined in every case as a question of fact by the same rules which apply to other cases of service performed, except that the extraordinary responsibility of the carrier for the safety of the goods must always, in such cases, be taken into consideration as an element of the service."[27] It has been held that a carrier, charging a higher rate for carrying freight in one direction than it does for carrying freight of the same class in the opposite direction, does not as a matter of law make an overcharge, within the meaning of a

L. ed. 683; Pittsburgh &c. Ry. Co. v. Fink, 150 U. S. 577, 63 L. ed. 1151, 40 Sup. Ct. 27; note in 49 L. R. A. (N. S.) 92.

[25] London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Killmer v. New York &c. R. Co., 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194; Newstadt v. Adams, 5 Duer (N. Y.) 43.

[26] Louisville &c. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244; Johnson v. Pensacola &c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029. In an action to recover excessive charges paid by the shipper, evidence of the charges of other companies for similar services offered by the defendant was held inadmissible in the absence of a showing that the conditions were substantially the same. Hopper v. Chicago &c. R. Co., 91 Iowa 639, 60 N. W. 487. In Canada &c. R. Co. v. International Bridge Co., L. R. 8 App. Cas. 723, it was held that the question is not what profit may be reasonable for a railway company, but "what it is reasonable to charge the person who is charged." But see Ames v. Union Pac. R. Co., 64 Fed. 165, affirmed in 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819. The question with reference to rate regulation by the state or United States is elsewhere considered.

[27] Hutchinson Carriers (3d ed.) § 804. Value and amount for which carrier is responsible may be taken into consideration and proportionate rate fixed. Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118; Georgia &c. R. Co. v. Johnson &c. Co., 121 Ga. 231, 48 S. E. 807; Duntley v. Boston &c. R. Co., 66 N. H. 263, 200 Atl. 327, 9 L. R. A. 449n, 49 Am. St. 610.

statute imposing penalties on carriers for making overcharges.[28]

§ 2363 (1561.) **How compensation is calculated.**—It frequently happens that the bulk, weight, or quantity, or amount of the goods or things shipped will necessarily vary at different times, and it may be more or less, or greater or smaller, at the time and place of final delivery than it was at the time and place of shipment. How, then, is the compensation to be calculated or determined, especially when it is based upon the bulk or weight of the goods? It may, of course, be determined by contract, but where the contract simply fixes the rate at so much per hundred, or per ton, or the like, without specifying whether it is to be calculated upon the weight or measurement at the place of delivery and without any provision as to leakage, shrinkage or evaporation on the one hand, or increase in bulk or weight on the other, it is evident that there is room for controversy. It is the general rule, as we have seen, that the carrier is entitled to freight only on what it carries and delivers, and the carrier ought therefore, to provide against decrease in freight by reason of shrinkage, leakage, evaporation, decay, or the like, or, in the case of live stock, death from the inherent vice.[29] Although, in the absence of such a provision, the carrier may lose freight from these causes, it can gain nothing from increase of bulk or weight after the goods are shipped, where there are no special stipulations upon the subject. Thus, it has been held in several cases, where grain and cotton had expanded and increased in bulk during the voyage, that the measurement or weight at the time of shipment must govern, and that, while the bulk or weight, at the destination might be "prima facie the criterion of the freight to be paid," when it is proved that the real quantity shipped was a different and smaller quantity, "the freight ought

[28] J. H. Scull &c. v. Atlantic Coal Line R. Co., 144 N. C. 180, 56 S. E. 876. See also Interstate Com. Com. v. Louisville &c. R. Co., 118 Fed. 613.

[29] Andover, The, 3 Blatchf. (U. S.) 303; Nine Thousand &c. Dry Hides, 6 Ben. (U. S.) 199; Boult v. Ship Naval Reserve, 5 Hughes (U. S. C. C.) 233. See Gibson v. Sturge, 10 Exch. 622; Shand v. Grant, 15 Com. B. (N. S.) 324; Allen v. Bates, 1 Hilt. (N. Y.) 221. But compare Barker v. Schooner E. M. Wright, 1 Mackey (U. S.) 24; Tio v. Vance, 11 La. 199, 30 Am. Dec. 715; Cuba, The, 3 Ware (U. S.) 260.

to be calculated upon the true quantity shipped."[30] It seems clear that a carrier has no right to regulate its charges in proportion to the prosperity of the industries whose products it transports.[31]

§ 2364 (1562.) **Compensation pro rata itineris.**—If the consignee or owner of goods stops and reclaims them after their transportation has begun and before they have reached their destination, the carrier, being without fault, and ready, able and willing to carry them to their destination is entitled to full freight to the original point of destination,[32] unless it waives the same by a new contract, or the like. But there are cases in which it would be to the interest of both the owner and the carrier to stop the goods at some intermediate point, and for the one to pay and the other to accept a proportionate compensation. This frequently happens where there is an accident or something which prevents the carrier from transporting the goods to their destination itself without delay, although it might forward them over some other line in time. In such a case the carrier might receive no further benefit by forwarding them over another line, and the owner might find a better market at the place of the accident, or elsewhere than at the original point of destination, or for some other reason might desire to take charge of them himself and relieve

[30] Gibson v. Sturge, 10 Exch. 622; Shand v. Grant, 15 Com. B. (N. S.) 324; Coulthurst v. Sweet, L. R. 1 C. P. 649; Nine Thousand &c. Dry Hides, 6 Ben. (U. S.) 199; Allen v. Bates, 1 Hilt. (N. Y.) 221. See as to undervaluation or misrepresentation, United States Exp. Co. v. Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600; Missouri Pac. R. Co. v. Crowell Lumber Co., 51 Nebr. 293, 70 N. W. 964 (by carrier); Pond-Decker Lumber Co. v. Spencer, 86 Fed. 846 (Same). And see as to fraudulent classification, Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108; Smith v. Findley, 34 Kans. 316, 8 Pac. 871.

[31] Tift v. Southern R. Co., 138 Fed. 753, aff'd in 148 Fed. 1021.

[32] Scothorn v. South Staffordshire R. Co., 8 Exch. 341; Ellis v. Willard, 9 N. Y. 529; Hughes v. Sun Mut. Ins. Co., 100 N. Y. 58, 2 N. E. 901, 3 N. E. 71; Jordan v. Warren Ins. Co., Fed. Cas. No. 7524, 1 Story (U. S.) 342; Whitney v. Rogers, 2 Disney (Ohio) 421. As to deducting what it would have cost to earn it, see Gazelle, The, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. ed. 496.

the carrier from further responsibility. They may, of course, make an express agreement to this effect and fix the amount of compensation to be paid for the services already performed; but, in the absence of an express contract, "if the owner thus voluntarily takes back the goods after a part of the service which the carrier undertook has been performed, the original contract of shipment is considered as abandoned by the agreement of the parties, and a new one is implied on the part of the shipper that he will pay the carrier a proportionate part of the freight, or as it is usually termed, pro rata itineris."[33] This rule is to be carefully applied, however, for the general rule is that if the bill of lading contains no provision for the payment of freight pro rata itineris, no freight is earned unless the transportation is completed and delivery is made, or ready to be made as specified,[34] and, in order to entitle the carrier to freight pro rata itineris, the acceptance of the goods by the owner or consignee, short of their destination, must be voluntary and under such circumstances as to give rise to the implication of a new contract.[35]

[33] Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406; Hunt v. Haskell, 24 Maine 339, 41 Am. Dec. 387; Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; Gray v. Waln., 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642; Forbes v. Rice, 2 Brev. (S. Car.) 363, 4 Am. Dec. 589; Crawford v. Williams, 1 Sneed (33 Tenn.) 205, 60 Am. Dec. 146, and note on page 153; Luke v. Lyde, 2 Burr. 882; Hutchinson Carriers (3d ed.), § 814. See also Southern Pac. R. Co. v. Haas (Tex.), 17 S. W. 600.

[34] Tornado, The, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. ed. 747; Bates v. White, 13 N. Y. St. 602; Western &c. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; New York Cent. &c. R. Co. v. Standard Oil Co., 87 N. Y. 486; China &c. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. 576; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46; Adams v. Haught, 14 Tex. 243. See also Insurance Co. v. Southern Pac. Co., 72 Fed. 285.

[35] Columbian Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.) 359, 3 L. ed. 370; Joseph Farwell, The, 31 Fed. 844; Merchants' &c. Ins. Co. v. Butler, 20 Md. 41; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354; Minnesota Min. Co. v. Chapman, 2 Ohio Dec. 207; Crawford v. Williams, 1 Sneed

§ 2365 (1563.) Excessive and unreasonable charges.—A railroad company, as a common carrier can not lawfully increase the charges for transportation by wrongfully diverting freight from its proper course in transit,[36] but, if the route which it adopts is a reasonable and proper one it may charge, at common law, for the number of miles over which it carries the goods although there is a shorter route.[37] It has also been held that it is not unreasonable for a railroad company to charge a lower rate for separate parcels directed to the same person than for similar parcels directed to different persons,[38] but a greater charge for the carriage of one package containing several parcels belonging to different persons than for the carriage of a package containing several parcels belonging to the same person is unreasonable and illegal under the English statute.[39] Where a carrier has agreed to carry a parcel at a certain rate without requiring its value to be stated, and the shipper is guilty of no wrong, it has been held that the carrier can not afterwards demand additional compensation upon finding that the value is greater than it supposed, and if it refuses to deliver the property without payment of an additional sum an action will lie for the amount so paid under duress of goods.[40]

(Tenn.) 205, 60 Am. Dec. 146 and note. As to the effect of accepting proceeds of sale, see Vlierboom v. Chapman, 13 M. & W. 230; Escopiniche v. Stewart, 2 Conn. 391; Richardson v. Young, 38 Pa. St. 169; Sampayo v. Salter, 1 Mason (U. S. C. C.) 43; Armroyd v. Union Ins. Co., 3 Binn. (Pa.) 437; Hurtin v. Union Ins. Co., 1 Wash. (U. S.) 530. See as to extra charge for milling in transit privileges and the like. Mollohan v. Atchison &c. Ry. Co., 97 Kans. 51, 154 Pac. 248, L. R. A. 1918A, 175 and note.

[36] Burlington &c. R. Co. v. Chicago &c. Co., 15 Nebr. 390, 19 N. W. 451. See also Bennett v. Missouri Pac. Ry. Co., 100 Kans. 537, 164 Pac. 1084, L. R. A. 1918A, 1061 and note; Belknap v. Baltimore &c. R. Co., 79 W. Va. 691, 91 S. E. 656, L. R. A. 1917C, 916 and note.

[37] London &c. R. Co. v. Myers, 39 L. J. C. P. 57, 21 L. T. R. 460. But compare Peters v. Railway Co., 42 Ohio St. 275, 51 Am. Rep. 814n.

[38] Baxendale v. Eastern Counties R. Co., 4 C. B. N. S. 63, 27 L. J. C. P. 137.

[39] Crouch v. Great Northern R. Co., 11 Exch. 742, 25 L. J. Exch. 137. See also Camblos v. Pennsylvania R. Co., 4 Brewst. (Pa.) 563.

[40] Baldwin v. Liverpool &c. R. Co., 74 N. Y. 125, 30 Am. Rep. 277. But see Missouri &c. R. Co. v. Trinity &c. Co., 1 Tex. Civ. App. 553; North German Lloyd v. Henle, 44 Fed. 100, 10 L. R. A. 814. Compare also Rowland v. New York

But it has been held that when, because of unexpected difficulties the shipper agrees to pay a sum in addition to what had previously been designated as the rate, he can not, after paying it, recover it back as paid without consideration.[41] A charge may be excessive because it is more than the rate fixed by contract, or is in violation of the interstate commerce law or the charter or other governing statute, or, in the absence of a specific contract, because it is more than the customary and usual rate for like services under like conditions. If a railroad company receives goods and agrees to transport them through to their destination at a specified rate, it is liable for overcharges made and collected by its connecting carriers.[42] But at common law no action lies against the lost connecting carrier to recover back a charge which is not unreasonable, but is in excess of the rate agreed upon by the first carrier, in the absence of proof that the first carrier had authority to bind such connecting carrier by its contract rate of shipment.[43] So, where a shipper applied to the station agent of the initial carrier for a through rate over several distinct lines and such station agent made inquiry of the general freight agent of the intermediate carrier and received from him a through rate from the point where his company would receive the goods to the place of destination, it was held that, no matter what the effect of this was as between the two carriers, such intermediate carrier did not thereby become liable to the shipper for the overcharges of subsequent carriers.[44] It is no concern of the shipper how con-

&c. R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. 175; Belton Oil Co. v. Gulf &c. R. Co., 41 Tex. Civ. App. 374, 92 S. W. 411.

[41] Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031.

[42] Little Rock &c. R. Co. v. Daniels, 49 Ark. 352, 5 S. W. 584, 32 Am. & Eng. R. Cas. 479; Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031, 9 Am. & Eng. R. Cas. 15. See also Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228n; Sumner v. Southern R. Assn., 7 Baxt. (Tenn.) 345, 32 Am. Rep. 565; Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. 856; Parker v. Bristol &c. R. Co., 6 Exch. 702. But compare Chicago &c. R. Co. v. Henderson (Tex. Civ. App.), 73 S. W. 36.

[43] Mount Pleasant Mfg. Co. v. Cape Fear &c. R. Co., 106 N. Car. 207, 10 S. E. 1046, 42 Am. & Eng. R. Cas. 498; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56; Condict v. Grand Trunk R. Co., 4 Lans. (N. Y.) 106. See, however, Brown v. Philadelphia &c. R. Co., 36 App. D. C. 221, 32 L. R. A. (N. S.) 189n.

[44] Hill v. Burlington &c. R. Co., 60 Iowa 196, 14 N. W. 249, 9 Am.

necting carriers apportion among themselves the amount charged for through freight,[45] and if he is simply charged a reasonable rate, to which he agrees at the time of making his contract for the shipment of the goods, he can not complain of the action of the initial carrier in taking more than its share of the through rate in violation of its contract with its connecting carrier, or in charging more than had been agreed upon between the two carriers without sharing the profit with the connecting line.[46]

§ 2366 (1564.) Rights and remedies where excessive charges are demanded.—As a general rule, neither injunction nor mandamus will lie to prevent a carrier from making excessive charges or to compel it to transport goods at the rate fixed by law, where the complainant has an adequate remedy at law and is not specially injured,[47] but it has been held that injunction will lie to restrain a railroad company from entering into an agreement not to transport goods, which it is required to transport, at the rate fixed by law,[48] and there are many cases in which railroad companies, as quasi public corporations, have been compelled by these remedies to perform their duties as such without unjust discrimination.[49] The shipper usually, however, has other reme-

& Eng. R. Cas. 21. Compare McLagan v. Chicago &c. R. Co., 116 Iowa 183, 89 N. W. 233.

[45] Owen v. St. Louis &c. R. Co., 83 Mo. 454, 25 Am. & Eng. R. Cas. 371. See also Morris &c. R. Co., v. Sussex R. Co., 20 N. J. Eq. 542.

[46] Arkansas &c. R. Co. v. Smith, 53 Ark. 275, 13 S. W. 929, 42 Am. & Eng. R. Cas. 348.

[47] Sutton v. Southeastern R. Co., 11 Jur. N. S. 935, 35 L. J. Exch. 38; State v. Mobile &c. R. Co., 59 Ala. 321; Rogers &c. Works v. Erie &c. R. Co., 20 N. J. Eq. 379; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218. See also Post v. Southern Railroad, 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481. But compare American Coal Co. v. Consolidation Coal Co., 46 Md. 15; Wellington v. Norwich &c. R. Co., 107 Mass. 582; Attorney-General v. Chicago &c. R. Co., 35 Wis. 425.

[48] Rogers &c. Works v. Erie &c. R. Co., 20 N. J. Eq. 379.

[49] Texas Exp. Co. v. Texas &c. R. Co., 6 Fed. 426; Fargo v. Redfield, 22 Fed. 373; Menacho v. Ward, 27 Fed. 529; International Exp. Co. v. Grand Trunk R. Co., 81 Maine 92; Atwater v. Delaware &c. R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543. Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 54 Am. Rep. 846; McCoy v. Cincinnati &c. R. Co., 22 Am. L. Reg. (N. S.) 725 and note; Twells v. Pennsylvania R. Co. (Pa.), 3 Am. L. Reg. (N. S.) 728. See also

dies. If he believes the charges to be unreasonable he may tender reasonable compensation, at the time he offers his goods for transportation, and, if the carrier refuses to transport them for that sum, the shipper may bring an action for such refusal,[50] "or, if the price for the carriage is not demanded in advance, the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and upon the carrier's refusal to accept the tender and deliver the goods, he may sue him for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier."[51] So, the consignee, or other proper party entitled to the goods, may obtain them by paying the charges exacted as a condition of their delivery, and then sue the carrier for the unlawful excess,[52] at least unless the payment was voluntarily made without compulsion or duress.[53] It is held in

Southern Exp. Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619.

[50] Carr v. Lancashire &c. R. Co., 7 Exch. 707. See also McDuffee v. Portland R. Co., 52 N. H. 430, 13 Am. Rep. 72.

[51] Hutchinson Carriers (3d ed.) § 805.

[52] Atchison &c. R. Co. v. Goetz &c. Co., 51 Ill. App. 151; Lafayette &c. R. Co. v. Pattison, 41 Ind. 312; Chicago &c. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320; Lake Erie &c. R. Co. v. Condon, 10 Ind. App. 536, 38 N. E. 71; Memphis &c. Co. v. Abell, 17 Ky. L. 191, 30 S. W. 658; Sewell v. Kansas City &c. R. Co., 119 Mo. 224, 24 S. W. 1002; Atchison &c. R. Co. v. Miller, 16 Nebr. 661, 21 N. W. 451; McGregor v. Erie R. Co., 35 N. J. L. 89; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Galveston &c. R. Co. v. Short (Tex. Civ. App.), 25 S. W. 142; Parker v. Bristol &c. R. Co., 6 Exch. 702; Parker v. Great Western R. Co., 7 M. & G. 253; Lancashire &c. R. Co. v. Gidlow, L. R. 7 H. L. Cas. 517; 32 L. T. R. 573; Crouch v. London &c. R. Co., 2 C. & K. 789. See also Virginia Coal &c. Co. v. Louisville &c. R. Co., 98 Va. 776, 37 S. E. 310; Robinson v. Baltimore &c. R. Co., 64 W. Va. 406, 63 S. E. 323; Louisville &c. R. Co. v. Walker, 110 Ky. 961, 63 S. W. 20; Southern R. Co. v. Anniston, 135 Ala. 315, 33 So. 274; Kindel v. Colorado &c. R. Co., 57 Colo. 1, 139 Pac. 1105, Ann. Cas. 1916A, 57n; Galesburg &c. R. Co. v. West, 108 Ill. App. 504. As to the statute of limitations, and when it begins to run, see Carrier v. Chicago &c. R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799, note in 45 Am. & Eng. R. Cas. 299.

[53] Killmer v. New York Cent. &c. R. Co., 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194, 23 Am. & Eng.

some jurisdictions that a protest is necessary,[54] but the weight of authority is to the effect that, as the parties are not on equal terms, and a protest would be idle, it is unnecessary where the owner is compelled to pay the charges demanded in order to get his goods carried, or to have them delivered to him and released from illegal restraint.[55] So, of course, where the payment is made under a mistake of fact, as, for instance, where it is supposed to be the true balance due on legal charge,[56] or is made in ignorance of the fact that rebates were allowed to others and upon the positive representations of the company that no rebates were allowed in any case,[57] the payment is not voluntary in such a sense as to prevent a recovery of the unlawful excess. We have considered this subject without reference to the interstate commerce law, for that is elsewhere treated, and we have stated the rules which govern in the absence of state legislation prohibiting unjust discrimination and providing new remedies or denouncing penalties

R. Cas. 659; Arnold v. Georgia R. &c. Co., 50 Ga. 304; Lafayette &c. R. Co. v. Pattison, 41 Ind. 312, and see cases cited in the following note.

[54] Evershed v. London &c. R. Co., L. R. 3 Q. B. Div. 134; London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Arnold v. Georgia R. &c. Co., 50 Ga. 304; Kenneth v. South Carolina R. Co., 15 Rich. L. (S. Car.) 284, 98 Am. Dec. 382; Potomac Coal Co. v. Cumberland &c. R. Co., 38 Md. 226.

[55] Mobile &c. R. Co. v. Steiner, 61 Ala. 559; Chicago & A. R. Co. v. Chicago &c. Coal Co., 79 Ill. 121; Louisville &c. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note; Heiserman v. Burlington &c. R. Co., 63 Iowa 732, 18 N. W. 903, 16 Am. & Eng. R. Cas. 46; Kansas &c. R. Co. v. Albers, 79 Kans. 59, 99 Pac. 819; Mount Pleasant &c. Co. v. Cape Fear &c. R. Co., 106 N. Car. 207, 10 S. E. 1046, 42 Am. & Eng. R. Cas. 498; Peters v. Marietta &c. R. Co., 42 Ohio St. 275, 51 Am. Rep. 814 and note, 18 Am. & Eng. R. Cas. 492; West Virginia Trans. Co. v. Sweetzer, 25 W. Va. 434, 22 Am. & Eng. R. Cas. 469; Graham v. Chicago &c. R. Co., 53 Wis. 473, 10 N. W. 609.

[56] Baltimore &c. R. Co. v. Faunce, 6 Gill (Md.) 68. See also National Tube Works v. Baltimore &c. R. Co., 4 Sad. (Pa.) 361, 8 Atl. 6, 28 Am. & Eng. R. Cas. 13 (mistake as to distance).

[57] Cook v. Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512. See also generally as to rights and remedies of shipper and effect of interstate commerce law as invalidating special contract, notes in 14 L. R. A. (N. S.) 400; 18 L. R. A. (N. S.) 124; 38 L. R. A. (N. S.) 351; and 49 L. R. A. (N. S.) 92.

for such discrimination and excessive charges. Most of the state statutes upon the subject prescribe a certain penalty to be recovered at the suit of the shipper or owner of the goods, and, in Kansas, it has been held that the statutory remedy is exclusive and abrogates the common-law remedy for the recovery of excessive charges.[58] But in other states it has been held that, as the statutes confer no new rights, the remedies which they give are not exclusive of the common-law remedy to recover for overcharges.[59] It is held by the Supreme Court of the United States that a carrier may enforce the scheduled rate properly filed under the interstate commerce law notwithstanding an agreement for a lower rate,[60] and that the carrier is not liable to refund the excess over an illegal special rate when the rate actually collected is the legal rate fixed by such schedule.[61]

[58] Beadle v. Kansas City &c. R. Co., 51 Kans. 148, 32 Pac. 910. See also Winsor Coal Co. v. Chicago &c. R. Co., 52 Fed. 716.

[59] Young v. Kansas City &c. R. Co., 33 Mo. App. 509; Murray v. Gulf &c. R. Co., 63 Tex. 407, 51 Am. Rep. 650 and note, 22 Am. & Eng. R. Cas. 464; Heiserman v. Burlington &c. R. Co., 63 Iowa 732, 18 N. W. 903; Fuller v. Chicago &c. R. Co., 31 Iowa 187. But see, as to interstate commerce and the effect of the interstate commerce law. Swift v. Philadelphia &c. R. Co., 58 Fed. 858, 64 Fed. 59 (with which compare Murray v. Chicago &c. R. Co., 62 Fed. 24); Gatton v. Chicago &c. R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556. See also Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Chicago &c. R. Co. v. Osborne, 52 Fed. 912; Wabash R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244.

[60] Texas &c. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011. See also St. Louis &c. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634n; Hanrigan v. Chicago &c. R. Co., 80 Nebr. 139, 117 N. W. 100; Central R. Co. v. Mauser, 241 Pa. St. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92 and note. But compare Illinois Cent. R. Co. v. Seitz, 214 Ill. 350, 73 N. E. 585, 105 Am. St. 108; St. Louis &c. R. Co. v. Spring River Stone Co., 169 Mo. App. 109, 154 S. W. 465. The consignor has generally been held liable. St. Louis &c. R. Co. v. Gramling, 97 Ark. 353, 133 S. W. 1129; Baltimore &c. R. Co. v. New Albany Box &c. Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28. Consignee was held liable in Central &c. R. Co. v. Willingham, 8 Ga. App. 817, 70 S. E. 199. And in New York &c. R. Co. v. York &c. Co., 215 Mass. 36, 102 N. E. 366. But not liable in Central R. Co. v. MacCartney, 68 N. J. L. 165, 52 Atl. 575, and Pennsylvania R. Co. v. Titus, 156 App. Div. 830, 142 N. Y. S. 43.

[61] Kansas &c. R. Co. v. Albers, 223 U. S. 573, 32 Sup. Ct. 316, 56

§ 2367 (1565.) Discrimination—Rebates.—As we have seen,[62] unjust discrimination in freight charges was not allowed at common law. It is also prohibited by statute in many states; and by the interstate commerce law, which is elsewhere considered. The subject of reasonable rates and unjust discrimination under the various state statutes has likewise been treated.[63] If there is no unjust discrimination an agreement by a railroad company that it will carry goods at a certain rate and repay the shipper a part thereof as a rebate after the shipment is not illegal at common-law, and the rebate may be recovered by the shipper in a proper case.[64] But the allowance of a rebate or drawback to a particular shipper may be an important matter to be considered with other circumstances as tending to show partiality and an unjust discrimination. Thus, it has even been held that the allowance of a rebate to favorite shippers from the regular schedule or tariff rates charged other customers generally for similar services under like conditions is sufficient to show an unjust discrimination which gives the customers against whom it is made a right to recover the amounts paid by them in excess of the rates charged the favorite shipper after deducting the rebate.[65] If the contract to pay

L. ed. 556; Texas &c. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553. See also Louisville &c. R. Co. v. Coquillard Wagon Works, 147 Ky. 530, 144 S. W. 1080, and note to Atchison &c. R. Co. v. Bell, 31 Okla. 238, 120 Pac. 987, in 38 L. R. A. (N. S.) 351; ante N. 24, and cases cited in last part of that note.

[62] Ante, § 2216. See also notes in 14 L. R. A. (N. S.) 400, and 26 L. R. A. (N. S.) 551.

[63] Ante, §§ 2216-2218.

[64] Goodridge v. Union Pac. R. Co., 37 Fed. 182; Bayles v. Kansas Pac. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; Kansas Pac. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744; Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754 and note, 22 Am. St. 593; Laurel Cotton Mills v. Gulf &c. R. Co., 84 Miss. 339, 37 So. 134, 137, 66 L. R. A. 453 (quoting text); Christie v. Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567; McNees v. Missouri Pac. R. Co., 22 Mo. App. 224; Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643; Benson, Ex parte, 18 S. Car. 38, 44 Am. Rep. 564. Nor is it necessarily illegal because it is kept secret by the parties. Hoover v. Pennsylvania R. Co., 156 Pa. St. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. 43; Borda v. Philadelphia &c. R. Co., 141 Pa. St. 484, 21 Atl. 665.

[65] Cook v. Chicago &c. R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512. See also Ar-

a rebate is legal and valid the shipper may, as we have seen, recover for a breach thereof, but if there is unjust discrimination and the shipper is compelled to rely upon an illegal promise to pay as the gist of his action he can not recover the rebate from the carrier after paying the freight in full.[66] So, where the carrier's agent by mistake names a lower rate than that fixed in the schedule, and the contract based thereon is in violation of the interstate commerce law, such contract is void and the carrier is entitled to demand the proper schedule rate as a condition of the delivery of the goods.[67] The shipper can maintain no action

mour Packing Co. v. United States, 153 Fed. 1, 14 L. R. A. (N. S.) 400 and note; Sullivan v. Minneapolis &c. R. Co., 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612n. But, as we have elsewhere shown, there are many authorities which hold that it does not necessarily follow that a charge is unreasonable from the mere fact that another is charged less and that the charge is not necessarily unlawful at common law, unless it injures the complainant or has a tendency to foster a monopoly, or the like. See, however, Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754 (distinguished and modified in Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505); Union Pac. R. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. ed. 896; New England Ex. Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 and note; Sharpless v. Mayor, 21 Pa. St. 147, 59 Am. Dec. 759 and note; Audenried v. Philadelphia &c. R. Co., 68 Pa. St. 370, 8 Am. Rep. 195.

[66] Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70; Indianapolis &c. R. Co. v. Davis, 32 Ill. App. 67; Indianapolis &c. R. Co. v. Ervin, 118 Ill. 250, 6 N. E. 862, 59 Am. Rep. 369; Hawley v. Kansas &c. Co., 48 Kans. 593, 30 Pac. 14; Parks v. Jacob Dold &c. Co., 6 Misc. 570, 27 N. Y. S. 289. See also Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755. As to the effect of the interstate commerce law on existing contracts for rebates, see Bullard v. Northern Pac. R. Co., 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246. See also Merchants' Cotton Press Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195; Fitzgerald v. Fitzgerald &c. Co., 41 Nebr. 374, 59 N. W. 838; Gatton v. Chicago R. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556.

[67] Savannah &c. R. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995. See also Western Ry. Co. v. Collins, 201 Ala. 455, 78 So. 833, and cases there cited in opinion; Louisville

against the carrier, in such a case, in which he is compelled to rely upon the illegal contract, and no matter whether the agent or a carrier gives an illegal rate by mistake or intentionally, the shipper can not enforce it against the connecting carrier which is not a party to the contract and receives and transports the goods without knowledge of any special agreement.[68]

§ 2368 (1566.) **Compensation for special services.**—Charges for extra or special services in addition to those required in the transportation of goods are not necessarily excessive and unlawful even where the total amount charged the shipper is thus caused to exceed the maximum charges allowed by statute for the carriage in the usual manner. Thus, as we shall hereafter show, a railroad company may sometimes charge demurrage for the use of its cars. So, it may charge for terminal services rendered after the completion of the transportation,[69] or for services

&c. R. Co. v. McMullen, 5 Ala. App. 662, 59 So. 683; Georgia R. Co. v. Creety, 5 Ga. App. 424, 63 S. E. 528; Baltimore &c. R. Co. v. New Albany Box &c. Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; Atchison &c. R. Co. v. Superior Ref. Co., 83 Kans. 732, 112 Pac. 604; Pennsylvania R. Co. v. Mogi, 71 Misc. 412, 128 N. Y. S. 643. And see ante n. 24.

[68] Chicago &c. R. Co. v. Hubbell, 54 Kans. 232, 38 Pac. 266. See also St. Louis &c. R. Co. v. Ostrander, 66 Ark. 567, 52 S. W. 435; Missouri &c. R. Co. v. Bowles, 1 Ind. Ter. 250, 40 S. W. 899; Church v. Minneapolis &c. R. Co., 14 S. Dak. 443, 85 N. W. 1001; Texas &c. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011. As already said in the text, the subject of rebates and discrimination under the interstate commerce law will be considered in another chapter, but reference is here made to the elaborate notes upon the subject in 14 L. R. A. (N. S.) 400, and 49 L. R. A. (N. S.) 92. And as to the effect of the Interstate Commerce Law on common law remedies, see Sullivan v. Minneapolis &c. Ry. Co., 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612 and note.

[69] Ante, § 2344; National Tube Works Co. v. Baltimore &c. R. Co., 4 Sad. (Pa.) 361, 8 Atl. 6, 28 Am. & Eng. R. Cas. 13. See also Walker v. Keenan, 73 Fed. 758; Central S. Y. Co. v. Louisville &c. R. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565; Interstate Com. Com. v. Chicago &c. R. Co., 186 U. S. 320, 22 Sup. Ct. 824, 46 L. ed. 1182; State ex rel. R. R. Com. v. St. Louis Hay. &c. Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004; Railroad &c. Com. ex rel. East Side Packing Co. v. Vandalia R. Co., 258 Ill. 397, 101 N. E. 600, Ann. Cass. 1914B, 363n; St. Louis &c. Ry. Co. v. State (Okla.), 198 Pac.

rendered in conveying property from its depot or regular place for receiving and delivering goods to an elevator[70] and the like,[71] or for furnishing food necessary for live stock where it is the owner's duty to furnish it and he fails to do so.[72] But extra charges can not be made under ordinary circumstances for furnishing proper station accommodations, weighing, checking, loading and unloading goods, or the like, as these things are usually incidents of the carriage and come within the ordinary duty of the carrier as such.[73] It is somewhat difficult to formulate

73. But where the service is incidental to the haul, as merely placing the car at the carrier's terminal or the like, the rule is otherwise. Interstate Com. Com. v. Atchison &c. R. Co., 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319; Minneapolis Civic &c. Assn. v. Chicago &c. R. Co., 134 Minn. 169, 158 N. W. 817, 163 N. W. 294. See also Chicago &c. Ry. Co. v. Minneapolis Civic &c. Assn., 347 U. S. 490, 38 Sup. Ct. 553, 62 L. ed. 1229.

[70] Owen v. St. Louis &c. R. Co., 83 Mo. 454, 25 Am. & Eng. R. Cas. 371. See also Providence Coal Co. v. Providence &c. R. Co., 15 R. I. 303, 4 Atl. 394, 26 Am. & Eng. R. Cas. 42; North Staffordshire R. Co. v. Salt Union, 10 R. & C. T. Cas. 161.

[71] See State ex. rel. R. R. Com. v. Florida &c. Ry. Co., 69 Fla. 491, 68 So. 761, L. R. A. 1918A, 158 and note; Johnson v. Cayuga &c. R. Co., 11 Barb. (N. Y.) 621; Pryce v. Monmouthshire R. Co., 49 L. J. Exch. 130, L. R. 4 App. Cas. 197; Dunkirk Colliery Co. v. Manchester &c. R. Co., 2 Nev. & Mac. 402; Monmouthshire R. Co. v. Williams, 27 L. T. R. 134; London &c. R. Co. v. Price, L. R. 11 Q. B. Div. 485; 52 L. J. Q. B. Div. 754. An allowance in the nature of a rebate to a packer for use of his private track in such services has been held illegal under the Interstate Commerce Law where such track joined that of the carrier forming part of an interstate system. Chicago &c. R. Co. v. United States, 156 Fed. 558, 26 L. R. A. (N. S.) 551 and note. See also note to Ellis v. Atlantic Coast Line R. Co., in 12 L. R. A. (N. S.) 506.

[72] Great Northern R. Co. v. Swaffield, 43 L. J. Exch. 89; L. R. 9 Exch. 132.

[73] Hall v. London &c. R. Co., L. R. 15 Q. B. Div. 505; 22 Am. & Eng. R. Cas. 446; Pegler v. Monmouthshire R. Co., 6 H. & N. 644, 30 L. J. Exch. 249. See also Lancashire &c. R. Co. v. Gidlow, L. R. 7 H. L. Cas. 517, 32 L. T. 573; Harrison v. Midland R. Co., 62 L. J. Q. B. 225, 68 L. T. 268; Burlington &c. R. Co. v. Chicago &c. Co., 15 Nebr. 390, 19 N.W. 451; Neston Colliery Co. v. London &c. R. Co., 4 R. Canal Tr. Cas. 257. Where contract for special rate was void, it was held that carrier might collect usual rate. Chicago &c. R. Co. v. Hubbell, 54 Kans. 232, 38 Pac. 266. See also Savannah &c. R. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995.

a general rule upon the subject, but we suppose that if the services are such as are customarily rendered as part of the transportation itself, or as properly incident thereto, no more than the maximum rate allowed by statute can be demanded, and a charge of more than is customarily charged others for like services under like conditions would be unreasonable and excessive, while for services which can not be deemed part of the transportation itself, or are not such as are usually rendered in transporting and delivering goods, a reasonable charge may be made in addition to the statutory or customary rate for the mere transportation itself.[74] It has been held that for a special service, such as the transportation of perishable goods by fast freight, requiring the cars to be specially fitted up for that purpose, their withdrawal from other service, their return empty on fast time and unusually prompt delivery of the goods at their destination, a carrier may charge a higher rate than that for the carriage of ordinary freight.[75] So, it has been held that a miller whose flour is taken directly from his mill into the cars of the carrier can not complain that the carrier bears a portion of the expense of cartage of other millers in the same city whose flour has to be carted to the cars of the carrier.[76]

§ 2369 (1567.) Demurrage.—It has been said that the right to demurrage exists only in maritime law and is confined to car-

[74] See Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 951, 954, 68 L. R. A. 715 (citing text). Carrier is entitled to compensation for stoppage in transit for inspection or the like for benefit of shipper. Southern Ry. Co. v. St. Louis Hay &c. Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004. See also Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32, 4 Ann. Cas. 12 (for services as warehouseman).

[75] Delaware State Grange &c. v. New York Cent. &c. R. Co., 3 Interstate Com. 554. See also Loud v. South Carolina R. Co., 4 Interstate Com. 205; Blockman v. Southern R. Co., 10 I. C. C. R. 350; Burton Stock Car Co. v. Chicago &c. R. Co., 1 Interstate Com. 329; Newland v. Northern Pac. R. Co., 4 Interstate Com. 205.

[76] Macloon v. Chicago &c. R. Co., 3 Interstate Com. 711; Hezel Milling Co. v. St. Louis &c. R. Co., 3 Interstate Com. 701. See also Chicago &c. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Dunkirk Colliery Co. v. Manchester &c. R. Co., 2 Nev. & Mac. 402; Savitz v. Ohio &c. R. Co., 150 Ill. 208, 37 N. E. 235.

riers by water.[77] But, while it is probably true that this right is derived by analogy from the maritime law as administered in America,[78] the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, "we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea."[79] After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them.[80] Why, then, when its duties as a carrier have been performed, and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload or who unreasonably delays the unloading of a car for his own benefit ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way.[81] Railroad companies as common carriers are "bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A.

[77] Burlington &c. R. Co. v. Chicago Lumber Co., 15 Nebr. 390, 19 N. W. 451; Chicago &c. R. Co. v. Jenkins, 103 Ill. 588. See also Crommelin v. New York &c. R. Co., 4 Keyes (N. Y.) 90. But a later Illinois case upon the subject holds that railroad companies also have this right. Schumacher v. Chicago &c. R. Co., 207 Ill. 199, 69 N. E. 825.

[78] In England, it has been said, no such right exists even under the maritime law in the absence of any contract for damages. See note in 22 L. R. A. 530.

[79] Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79.

[80] See also Gulf City Constr. Co. v. Louisville &c. R. Co., 121 Ala. 621, 25 So. 579.

[81] Text quoted with approval in Schumacher v. Chicago &c. R. Co., 207 Ill. 199, 69 N. E. 825, 829, and cited in Darlington v. Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

be allowed to hold a car unloaded (or loaded) at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B. it is obvious that both the railroad company and the public will suffer injury."[82] It is also well-settled that common carriers may make reasonable rules and regulations for the convenient transportation of their business. It follows, from this line of reasoning, that railroad companies may adopt and enforce general rules, which are, or ought to be, known to their customers, making a reasonable charge for the unreasonable detention of their cars.[83] In a number of cases a charge of one dollar a day for the detention of a car after the lapse of forty-eight hours, Sundays and legal holidays excepted, has been held not to be

[82] Per Fauntleroy, J., in Norfolk &c. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. 916 and note. In the case of Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 383, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79, the court said: "The law compels the carrier to receive the goods of the public, and to transport and deliver them within a reasonable time. * * * To do this it is necessary that the means of transportation shall be under the carriers' control, and that after the duty of carriage has been performed its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed on such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freight, thus requiring it to provide extra facilities as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carriers' tracks, and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation."

[83] Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79; Dixon v. Central R. Co., 110 Ga. 173, 35 S. E. 369; Kentucky Wagon &c. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W.

unreasonable as a matter of law.[84] So, a charge of two dollars a day, after the lapse of twenty-four hours has been enforced where the customer knew of the rule at the time the shipment was made.[85] Where corn was shipped to a way-station, subject to the shipper's order, and he allowed it to remain there until he sold it, knowing that the person he had expected to receive and pay for it could not do so and that he was expected to pay a dollar for the use of the car while the corn was in it, the court held that he could not recover such demurrage which he had been compelled to pay either upon the ground that it was an "overcharge in freight," or "money paid in excess of what was due the defendant for services rendered."[86] So, where a statute forbade railroad companies to charge or receive any fee or commission for transportation, storage or delivery other than the regular transportation fees, storage and other charges authorized by law for mani-

595, 36 L. R. A. 850, 56 Am. St. 326; Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 951, 954, 68 L. R. A. 715 (citing text); Swan v. Louisville &c. R. Co., 106 Tenn. 229, 61 S. W. 57, 58 (citing text); Norfolk &c. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. 916; Kansas Pac. R. Co. v. McCann, 2 Wyo. 3. See also Southern R. Co. v. Lockwood, 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32, 4 Ann. Cas. 12; Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 S. W. 530; Hockfield v. Southern R. Co., 150 N. Car. 419, 64 S. E. 181, 134 Am. St. 945; Pennsylvania R. Co. v. Midvale Steel Co., 201 Pa. St. 624, 51 Atl. 313, 88 Am. St. 836. As to the right to charge demurrage where refusal to receive goods is due to dispute, see Holloman v. Southern R. Co., 172 N. Car. 372, 90 S. E. 292, L. R. A. 1917C, 416n, Ann. Cas. 1917E, 1069. As to provision against demurrage in case of strike, see note in 5 L. R. A. (N. S.) 126. Where the bill of lading calls for delivery at a particular place, delivery at a different place will not authorize a demurrage charge even though it had been the custom of the carrier to deliver at the latter place. North Shore Imp. Co. v. New York &c. R. Co. (Va.), 108 S. E. 11.

[84] Kentucky Wagon &c. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. 326; Miller v. Georgia R. &c. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170, 50 Am. & Eng. R. Cas. 79 and note; Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32. See also reports of railroad commissioners referred to in note in 22 L. R. A. 532.

[85] Miller v. Mansfield, 112 Mass. 260.

[86] Hunt v. Missouri &c. R. Co. (Tex. Civ. App.), 31 S. W. 523.

festing, receiving or shipping, it was held that a rule imposing a charge of one dollar a day for the detention of a car, after notice to the consignee of its arrival and the lapse of seventy-two hours, was not unreasonable or in violation of the statute.[87] The court said that such charge was not for transportation, storage or delivery, but was for the use and occupation of the cars and the obstruction of the track by the consignees for an unreasonable time after the contract for transporting and delivering the freight had been fulfilled. Where a shipper consigned a certain number of car loads of grain to himself at a station on a connecting line, and the grain in transit was transferred from the cars of the initial carrier to the cars of the connecting line, a notice by the carrier to the shipper of the arrival of the number of cars of grain consigned, in its cars bearing certain numbers, was held sufficient notice to render him liable for demurrage on his failure to unload it within proper time after arrival, without stating in what cars it was originally shipped or into what particular cars it had been transferred.[88] Demurrage rules of a state commission have been held valid as to intrastate commerce and invalid as to interstate commerce.[89] Interstate transportation under the Interstate Com-

[87] Norfolk &c. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. 916 and note.

[88] Galveston &c. R. Co. v. Hunt (Tex. Civ. App.), 32 S. W. 549. See also as to notice Chicago &c. Ry. Co. v. Woolner Distilling Co., 160 Ill. App. 192; United States v. Texas &c. R. Co., 185 Fed. 820; Citizens' Bank v. Norfolk &c. Ry. Co., 115 Va. 45, 78 S. E. 568. In Baltimore &c. R. Co. v. Luella Coal &c. Co., 74 W. Va. 289, 81 S. E. 1044, 52 L. R. A. (N. S.) 398n, it is held that, in the absence of a special contract, the shipper of coal in carload lots to a consignee who refuses to receive it is liable to the carrier for the freight and also demurrage accruing after notice of such refusal, but that it is the duty of the carrier to give such notice, where the carrier is not under duty to unload, and the consignor is not liable for demurrage until such notice is given to him. As to a custom or agreement to give such notice to a particular shipper being unlawful discrimination under Interstate Commerce Law, see Atchison &c. R. Co. v. Stannard, 99 Kans. 720, 162 Pac. 1176, L. R. A. 1917C, 1124n. Goods subject to a cartage tariff were held not exempt from demurrage, unless failure to make delivery in specified free time was that of the company, in Michigan Cent. R. Co. v. United States, 246 Fed. 353 (certiorari denied in 246 U. S. 663, 38 Sup. Ct. 333, 62 L. ed. 647-680).

[89] Michigan Cent. R. Co. v. Mich-

merce Law covers all stages from the delivery of freight to the carrier until it is finally delivered by the latter at the destination, and the matter of demurrage and track storage charges on interstate shipments, is therefore within the jurisdiction of the Interstate Commerce Commission,[90] and the Interstate Commerce Law as to filing tariff of charges and against discrimination applies to demurrage charges and discriminations in enforcing the rules, regulations and rates as to demurrage.[91]

§ 2370 (1567a.) **Lien for demurrage.**—There is some conflict among the authorities as to whether the carrier can have any lien for demurrage charges in the absence of a specific contract to that effect, and two of the most recent cases upon the subject are diametrically opposed to each other.[92] It was held in the cases

igan R. R. Com., 183 Mich. 6, 148 N. W. 800, Ann. Cas. 1916E, 695. But state reciprocal demurrage statutes have been held invalid in several cases on the ground that Congress had acted and covered the subject. Chicago &c. Ry. Co. v. Hardwick &c. Elevator Co., 226 U. S. 426, 57 L. ed. 284, 33 Supt. Ct. 174; St. Louis &c. Ry. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. 262. See also for shipment held subject to demurrage tariff filed in accordance with Interstate Commerce Act, Norfolk &c. Ry. Co. v. Swift & Co., 56 Pa. Super. Ct. 471. And see generally as to power of state and state railroad commission as to demurrage charges, notes to St. Louis &c. R. Co. v. State, in 30 L. R. A. (N. S.) 137; State of Fla. v. Atlantic &c. R. Co., in 32 L. R. A. (N. S.) 652. For validity and effect of Kansas reciprocal demurrage act. See Offerle Grain &c. Co. v. Atchison &c. R. Co., 105 Kans. 272, 182 Pac. 405.

[90] Michie v. New York &c. R. Co., 151 Fed. 694; United States v. Standard Oil Co., 148 Fed. 719. See also Chicago &c. R. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. ed. 284, 46 L. R. A. (N. S.) 203.

[91] Lehigh Valley R. Co. v. United States, 188 Fed. 879 (demurrage of charges must be filed); Michie v. New York &c. R. Co., 151 Fed. 694 (same). During the war regulations on this subject were made by general orders of the Director-General. Where carrier collected demurrage in excess of that authorized by its published tariff, it was held that shipper could recover the excess in Southern Ry. Co. v. Buckeye Cotton Oil Co. (Miss.), 89 So. 228.

[92] Southern R. Co. v. Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A. 227, 110 Am. St. 32; Pittsburg &c. R. Co. v. Mooar Lumber Co., 27 Ohio Cir. Ct. 588; Baltimore &c. R. Co. v. Luella Coal &c. Co., 74 W. Va. 289, 81 S. E. 1044, 52 L. R. A. (N. S.) 398, hold-

cited in the first note to the last preceding section that a railroad company can have no lien for demurrage charges, but, as we have seen, those cases deny in toto the right to charge for delay or detention of cars, in the absence of a contract, and, to that extent at least, are contrary to the weight of authority. In several of the cases which assert the right to charge demurrage it is expressly held that the company may have a lien for such charges, and in others there are intimations to the same effect.[93]

§ 2371 (1568.) Car service associations.—Where there are connecting carriers it is frequently more convenient both for them and for their customers to enforce demurrage charges by means of "Car Service Associations." Such associations are usually formed by the voluntary act of the different companies each of which usually has a representative upon the executive committee, and the rules adopted by the association in regard to demurrage charges are accepted by them and become their own rules. "That there may be a reasonable charge for the detention

ing that they may; and Nicolette Lumber Co. v. People's Coal Co., 213 Pa. St. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. 550, holding that they can not, at least in the absence of an agreement to that effect. In this last case it is said that even if the carrier had a right to charge for the detention, still, it was not entitled to a lien therefor. See also East Tenn. &c. R. Co. v. Hunt, 15 Lea (Tenn.) 261; Wallace v. Baltimore &c. R. Co., 216 Pa. St. 311, 65 Atl. 665. And compare Thomas v. Northwestern R. Co., 111 S. Car. 475, 98 S. E. 336.

[93] Darlington v. Missouri &c. R. Co., 99 Mo. App. 1, 72 S. W. 122; New Orleans &c. R. Co. v. George, 82 Miss. 710, 35 So. 193; Schumacher v. Chicago &c. R. Co., 207 Ill. 199, 69 N. E. 825; Miller v. Mansfield, 112 Mass. 260; Kentucky Wagon &c. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. 326. See also Jelks v. Philadelphia &c. R. Co., 14 Ga. App. 96, 80 S. E. 216; Southern R. Co. v. Born Steel Range Co., 126 Ga. 527, 55 S. E. 173; Barker v. Brown, 138 Mass. 340; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, 148 and note; Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254 and note; Alden v. Carver, 13 Iowa 253, 81 Am. Dec. 430; Kansas Pac. R. Co. v. McCann, 2 Wyo. 3. But compare East Tenn. &c. R. Co. v. Hunt, 15 Lea (Tenn.) 261; Chicago &c. R. Co. v. Floyd (Tex. Civ. App.), 161 S. W. 954 (consignor not liable where carrier knows that he was only an agent for a known principal).

of the carrier's cars by the consignee or consignor beyond a reasonable time within which to load and unload them can not now be doubted, and that such charges may be imposed and enforced through what are known over the country as 'Car Service Associations,' is equally well settled,"[94] except as the matter may now be determined or regulated by late amendments to the Interstate Commerce Law and the action of the Interstate Commerce Commission. Such associations, formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt loading, unloading and return of cars, can not be held illegal upon the ground that the constituent companies by becoming members surrender their corporate functions and control to the associations, nor upon the ground that, under the rules adopted, one of the members is authorized to collect charges on cars that belong to other members, nor because imposing and enforcing charges for detention through the association, involves, in effect at least, an agreement by the different members to make their charges uniform.[95] A car service rule has been held unreasonable, however, which required a shipper to pay car service charges, whether just or unjust, with no redress but to submit a claim for the return of the money to the manager of the car service association promulgating the requirement. The court observed: "A shipper ought not to be compelled to pay an unjust charge for car service with no redress, but to submit a claim for the return of his money to the manager of the association promulgating the rule or order. The weight of authority seems to be that the carrier has a lien for compensation for the use of cars beyond reasonable free time. If the lien be waived the courts are open. But the car service association holds no franchise to compel the payment of claims of this kind, and then to decide for itself whether or not it will refund."[96] And the whole

[94] Kentucky Wagon &c. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. 326; Yazoo &c. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715 (citing text). See also Miller v. Georgia &c. R. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170.

[95] Kentucky Wagon &c. Co. v. Ohio &c. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. 326. See also St. Louis &c. Ry. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 1181, 122 Am. St. 33 (citing text).

[96] Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kans. 808,

subject in the case of interstate shipments may be affected by the Interstate Commerce Law, which requires demurrage rates or charges to be published as well as other tariffs,[97] and, by recent amendments, puts car service in interstate commerce very largely under the control of the Interstate Commerce Commission and its agencies.[97a]

§ 2372 (1569.) Collecting charges—Connecting carriers.[98]—We have already seen that a carrier may require the payment of freight in advance, but that if it fails to do so and there is no contract to pay before delivery, it can not, as a general rule, maintain an action for the freight until it has delivered or properly offered to deliver the goods. A demand, by mistake, of more than is due is no defense to an action for what is due and does not waive a tender of the proper amount.[99] But it has been held that a carrier, by limiting its claim to services performed between certain dates,

88 Pac. 72. See also Arkansas case cited in last preceding note. Demurrage rules are construed liberally in favor of the shipper. Staten Island &c. Transt. R. Co. v. Marshall, 136 App. Div. 571, 121 N. Y. S. 82. Compare New Orleans &c. R. Co. v. A. H. George &c. Co., 82 Miss. 710, 35 So. 193. As to construction of state demurrage statutes, see Gray v. Minneapolis &c. R. Co., 110 Minn. 527, 124 N. W. 1100; Hardwick Farmers' Elevator Co. v. Chicago &c. R. Co., 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; Wooley v. Chicago &c. R. Co., 150 Wis. 183, 136 N. W. 616.

[97] Lehigh Val. R. Co. v. United States, 188 Fed. 879, 110 C. C. A. 513; United States v. Philadelphia &c. R. Co., 184 Fed. 543; Gault Lumber Co. v. Atchison &c. Ry. Co., 37 Okla. 24, 130 Pac. 291.

[97a] See Act Feb. 28, 1920, ch. 91, §§ 400-403; Acts May 29 and Aug. 10, 1917; Barnes' Fed. Code, 1921 Supp. § 7884, pars. 10-17. The Interstate Commerce Commission approved the National Car Demurrage Rules Jan. 17, 1916, and in Pennsylvania R. Co. v. Kittanning Iron &c. Co., 253 U. S. 319, 40 Sup. Ct. 532, the rules of the Uniform Demurrage Code in relation to average agreement and bunching are set out and construed the court holding that in applying the allowance of free time and charges for demurrage the single car should be treated as the unit, at least under an average agreement, and that demurrage was collectible where a single car of frozen ore could have been unloaded within free time.

[98] This section is cited in Northern Pac. Ry. Co. v. Pleasant River Granite Co., 116 Maine 496, 102 Atl. 298, 299.

[99] Loewenberg v. Arkansas &c. R. Co., 56 Ark. 439, 19 S. W. 1051.

may make those dates material so as to prevent a recovery in such action for services performed before or after the time designated.[1] The carrier usually, however, enforces the payment of freight or collects it by holding and selling the goods, if necessary, by virtue of its lien, of which we shall treat in the next section. As a general rule the consignor, whether the owner or the agent of the owner of the goods, is regarded as having authority to agree to the terms of transportation,[2] and a carrier receiving goods for transportation beyond its own line has the implied authority, in the absence of anything to the contrary, to select any of the usual routes, and is regarded as the forwarding agent of the owner, so that a subsequent independent connecting carrier, receiving the goods in the usual and ordinary course of business, without notice of any special agreement with the initial carrier, is generally entitled to demand the ordinary and usual freight for its services in transporting them to their destination.[3] It has also been held that it may require prepayment of the freight,[4] and is

[1] Manchester &c. R. Co. v. Fisk, 33 N. H. 297.

[2] Ryan v. Missouri &c. R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703; ante, §§ 2120, 2265. See also Baltimore &c. R. Co. v. New Albany Box &c. Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; Portland Flouring Mills Co. v. British &c. Ins. Co., 130 Fed. 860.

[3] Price v. Denver &c. R. Co., 12 Colo. 402, 21 Pac. 188; Patten v. Union Pac. R. Co., 29 Fed. 590; Missouri &c. R. Co. v. Stoner, 5 Tex. Civ. App. 50, 23 S. W. 1020; Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56. See also Beasley v. Baltimore &c. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048; Wolf v. Hough, 22 Kans. 659; Louisiana Ry. &c. Co. v. Holly, 127 La. 615, 53 So. 882; Crossan v. New York &c. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 776, and note, 14 Am. St. 408; ante, § 2191, where numerous authorities are cited. Connecting carrier is held bound by initial carrier in Oden-Elliott Lumber Co. v. Louisville &c. R. Co. (Ala.), 77 So. 240, and by tariff rate established by Interstate Commerce Commission, in Lancaster v. Schreiner, 202 Mo. App. 459, 212 S. W. 19. Under the Interstate Commerce Act the carrier is required to collect the lawful rate on an interstate shipment, and the shipper is prima facie the one to pay the charges. Central of Ga. Ry. Co. v. Southern Ferro Concrete Co., 193 Ala. 108, 68 So. 981, Ann. Cas. 1916E, 376 and note.

[4] Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 74; ante, § 2360. See also Southern Ind. Express Co. v. United States Exp. Co., 92 Fed. 1022.

entitled to a lien not only for its own charges but also for freight properly paid by it to the preceding carrier.[5] But it has been held that although goods are shipped under a special contract as to charges without notice to the connecting carrier, and the waybill shows charges in excess of the contract rate, if the connecting carrier, without paying such charges, carries the goods to their destination but refuses to deliver them on tender of the contract price, which exceeds the amount due it, such connecting carrier is liable for damages sustained by the consignee by its failure to deliver after having a reasonable time to ascertain the facts about the special contract.[6] If the initial carrier agrees to transport goods to their destination beyond its own line at a guaranteed rate and the connecting carriers charge the shipper a higher rate the initial carrier is liable to him for the excess.[7] It is not unusual for the last carrier, as agent for the first, to collect the freight due the first carrier as well as its own.[8]

[5] Bird v. Georgia &c. R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; Thomas v. Frankfort &c. R. Co., 116 Ky. 879, 76 S. W. 1093; Briggs v. Boston &c. R. Co., 88 Mass. 246, 83 Am. Dec. 626; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Hoffman v. Lake Shore &c. R. Co., 125 Mich. 201, 84 N. W. 55; Illinois Cent. R. Co. v. Brookhaven, 71 Miss. 663, 16 So. 252; Moore v. Henry, 18 Mo. App. 35; Berry v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714; Knight v. Providence &c. R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; Moses v. Port Townsend &c. R. Co., 5 Wash. St. 595, 32 Pac. 488, 1000. See also ante, § 2191.

[6] Illinois Cent. R. Co. v. Brookhaven &c. Co., 71 Miss. 663, 16 So. 252. See also Evansville &c. R. Co. v. Marsh, 57 Ind. 505; Cleveland &c. R. Co. v. Anderson Tool Co., 180 Ind. 453, 103 N. E. 102, 49 L. R. A. (N. S.) 749, Ann. Cas. 1916B, 1217. But compare Miller v. Texas &c. R. Co., 83 Tex. 518, S. W. 954; Texas &c. Ry. Co. v. Reed, 56 Tex. Civ. App. 452, 121 S. W. 579; Moses v. Port Townsend &c. R. Co., 5 Wash. 595, 32 Pac. 488. And see Reynolds &c. v. Seaboard &c. Ry., 81 S. Car. 383, 62 S. E. 445.

[7] Detroit &c. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031, 9 Am. & Eng. R. Cas. 15; Little Rock &c. R. Co. v. Daniels, 49 Ark. 352, 5 S. W. 584, 32 Am. & Eng. R. Cas. 479.

[8] Trottier v. Red River &c. Co., Manitoba (T. Wood), 255; New York Cent. &c. R. Co. v. Weil, 65 Misc. 179, 119 N. Y. S. 676. See also Reidsville Paper Box Co. v. Southern Ry. Co., 177 N. Car. 23, 99 S. E. 23.

§ 2373 (1570.) **Carrier's lien for freight.**—It is well settled that a carrier is entitled to a lien upon the goods transported by it to secure the freight which is justly due for their transportation. Speaking generally, this lien is co-extensive with the right to recover freight.[9] It is a specific and not a general lien, that is, it is confined to charges and advances upon the particular goods[10] for, or incident to their transportation.[11] The carrier has no general lien, in the absence of a contract, statute or governing custom to that effect, upon goods transported by it, for a general balance of account or freight due it upon other goods previously transported.[12] But, as we have seen, the carrier's lien may include the charges of a prior connecting carrier.[13] And it has been held

[9] Ewart v. Kerr, Rice L. (S. Car.) 203; Hall v. Dimond, 63 N. H. 565; Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350. See also Pittsburgh &c. Ry. Co. v. Fink, 250 U. S. 577, 63 L. ed. 1151, 40 Sup. Ct. 27.

[10] Bacharach v. Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. 885; Pharr v. Collins, 35 La. Ann. 939, 48 Am. Rep. 251; Wright v. Snell, 5 B. & O., 350, 7 E. C. L. 127, 45 Am. & Eng. R. Cas. 365; Hartshorne v. Johnson, 7 N. J. L. 108; Atlas Steamship Co. v. Columbian Land Co., 102 Fed. 358. But compare Pennsylvania Steel Co. v. Georgia R. Co., 94 Ga. 636, 21 S. E. 577.

[11] Culbreth v. Philadelphia &c. R. Co., 3 Houst. (Del.) 392; Illinois Cent. R. Co. v. Alexander, 20 Ill. 23; Miller v. Mansfield, 112 Mass. 260; Steamboat Virginia v. Kraft, 25 Mo. 76; Isham v. Greenham, 1 Handy 357, 12 Ohio Dec. 182; Nicolette Lumber Co. v. Peoples Coal Co., 213 Pa. St. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327n, 110 Am. St. 550, 5 Ann. Cas. 387; Lambert v. Robinson, 1 Esp. 119; Kinnear v. Midland R. Co., 19 L. T. N. S. 387. See also Payne v. Ralli, 74 Fed. 563; Southern Exp. Co. v. Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197; Berry &c. Co. v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714. That it is not assignable see Ames v. Palmer, 42 Maine 197, 66 Am. Dec. 271; Rosencranz v. Swofford, 175 Mo. 518, 75 S. W. 445, 97 Am. St. 609.

[12] Atlas Steamship Co. v. Columbian Land Co., 102 Fed. 358; Atchison &c. R. Co. v. Bourdette, 74 Kans. 137, 85 Pac. 820; McFarland v. Wheeler, 26 Wend. (N. Y.) 467, note in 42 Am. & Eng. R. Cas. 364; Leonard's Exrs. v. Winslow, 2 Grant (Pa.) 139; Bacharach v. Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; Rushforth v. Hadfield, 6 East 519; Butler v. Woolcott, 2 B. & P. N. R. 64.

[13] Ante, §§ 2191, 2373. See also Bissel v. Price, 16 Ill. 408, 413;

where the shipment was made over the lines of several carriers, but not under a through bill of lading, and the different carriers concerned in the shipment were not shown to constitute a connecting line by virtue of any traffic arrangement or association, that the final carrier could pay apparently proper transportation charges demanded by a previous carrier, or hold the property according to any lawful directions given for the enforcement of a lien for such charges, unless it had notice or knowledge that in the particular instance the charge was unlawful; and, while it must act in good faith towards the consignee, it was not bound to investigate at its own trouble and expense the merits of an apparently just claim preferred by a preceding carrier.[14] So, legal import duties paid by the carrier may be included,[15] and a more comprehensive lien than that which existed at common law is provided for by statute in many of the states.[16] But a connecting carrier which receives goods with notice that the freight has been paid in advance for through transportation, or that the goods have been wrongfully diverted to its route is not entitled to a lien for charges.[17] So, as against the true owner who is in no way in fault, a carrier acquires no right to a lien for charges upon the goods which it carries for one who wrongfully has possession of

Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. ed. 397; Bennett Bros. Lumber Co. v. Robinson, 159 Fed. 910; Georgia R. Co. v. Murrah, 85 Ga. 343, 11 S. E. 779; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228; Vaughan v. Providence &c. R. Co., 13 R. I. 578; Waldron v. Canadian &c. R. Co., 22 Wash. 253, 60 Pac. 653.

[14] Berry Coal &c. Co. v. Chicago &c. R. Co., 116 Mo. App. 214, 92 S. W. 714. But compare Converse Bridge Co. v. Collins, 119 Ala. 534, 24 So. 561.

[15] Guesnard v. Louisville &c. R. Co., 76 Ala. 453, 23 Am. & Eng. R. Cas. 691; Dennie v. Harris, 9 Pick. (Mass.) 364; Harris v. Dennie, 3 Peters (U. S.) 292, 7 L. ed. 683; Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. ed. 397; Bennett Bros. Lumber Co. v. Robinson, 159 Fed. 910, 913. See Cleveland &c. R. Co. v. McClung, 119 U. S. 454, 7 Sup. Ct. 262, 28 Am. & Eng. R. Cas. 70; Wyman v. Lancaster, 32 Fed. 720.

[16] See 13 Am. & Eng. Ency. of Law, 580. The federal 28-hour live stock act provides for a lien for food, care and custody of animals shipped.

[17] Marsh v. Union Pac. R. Co., 9 Fed. 873, 6 Am. & Eng. R. Cas. 359; Travis v. Thompson, 37 Barb. (N. Y.) 236; Bird v. Georgia &c. R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas.

them and has no authority to direct their shipment.[18] But where the owner clothes a third person with apparent authority to act for him in securing the transportation of property, the carrier, transporting the property pursuant to a contract with such third person, may usually look to the owner for his reasonable charge, and hold a lien on the property for the same.[19] And where there is no question of this kind and the carrier is entitled to a lien, such lien is superior to the owner's right of stoppage in transitu and he must pay the carrier's charges on the particular goods before he is entitled to their possession,[20] although the goods can not be held by the carrier to compel him to pay a general balance due

39; Denver &c. R. Co. v. Hill, 13 Colo. 35, 21 Pac. 914, 4 L. R. A. 376. See also Converse Bridge Co. v. Collins, 119 Ala. 534, 24 So. 561; Glover v. Girardeau &c. R. Co., 95 Mo. App. 369, 69 S. W. 599; Wichman v. Atlantic &c. R. Co., 100 S. Car. 138, 84 S. E. 420. But compare Wolf v. Hough, 22 Kans. 659; Crossman v. New York &c. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. 408, 40 Am. & Eng. R. Cas. 136 and note; Fordyce v. Johnson, 56 Ark. 430, 19 S. W. 1050; Thomas v. Frankfort &c. R. Co., 116 Ky. 879, 76 S. W. 1093. See ante, § 2191.

[18] Savannah &c. R. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401; Ames v. Palmer, 42 Maine 197, 66 Am. Dec. 271; Stevens v. Boston &c. R. Co., 8 Gray (Mass.) 262; Robinson v. Baker, 59 Mass. 137, 51 Am. Dec. 54; Gibson v. Gwinn, 107 Mass. 126, 9 Am. Rep. 13; Pingree v. Detroit &c. R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; Travis v. Thompson, 37 Barb. (N. Y.) 236; Collman v. Collins, 2 Hall (N. Y.) 569; Vaughan v. Providence &c. R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41; Kohn v. Richmond &c. R. Co., 37 S. Car. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. 726; Liefert v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. 899; ante, § 2191. But the rule seems to be otherwise in England.

[19] Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080. Compare, however, Corinth Engine &c. Works v. Mississippi Cent. R. Co., 95 Miss. 817, 49 So. 261. And see where carrier wrongfully delivers goods to consignee without payment of purchase money and he sells to bona fide purchaser, Norfolk &c. R. Co. v. Barnes, 104 N. Car. 25, 10 S. E. 83, 5 L. R. A. 611.

[20] Raymond v. Tyson, 17 How. (U. S.) 53, 15 L. ed. 47; Pennsylvania Steel Co. v. Georgia R. &c. Co., 94 Ga. 636, 21 S. E. 577; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247, 3 Am. & Eng. R. Cas. 424; Chandler v. Belden, 18 Johns (N. Y.) 157; Benjamin Sales, § 836; ante, § 2322. See also Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84, holding that such lien takes precedence of any claims against the owner or consignee of

it from the consignee.[21] The lien of a carrier and warehouseman for transporting and keeping goods is also superior to that of a pledgee who procured such transportation and storage.[22] But the fact that the carrier has a superior lien and may detain the goods, does not give it the right to injure or abandon them, and it is bound to take reasonable measures for their preservation and protection while it detains them for its charges.[23]

§ 2374 (1571.) **Enforcement of lien.**—If the freight is not paid within a reasonable time after the arrival of the goods at their destination, the carrier, having performed its part of the contract of carriage and being ready to deliver upon payment of the carriage, may store the goods with a responsible warehouseman, either in the name of the owner, subject to its lien, or in its own name,[24] and such warehouseman will hold them as the representative of the carrier for the purpose of preserving the lien.[25] The carrier may proceed in equity to obtain a judicial decree for

goods. But see Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647n, 11 Am. St. 760.

[21] Oppenheim v. Russell, 3 B. & P. 42; Jackson v. Nichol, 5 Bing. N. Cas. 508; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 3 L. R. A. 647; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 12 Am. St. 885. See also Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Mercantile &c. Bank v. Gladstone, L. R. 3 Exch. 233.

[22] Cooley v. Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609. See also Gracie v. Palmer, 8 Wheat (U. S.) 605, 5 L. ed. 696. But see Owen v. Burlington &c. R. Co., 11 S. Dak. 153, 76 N. W. 302, 74 Am. St. 786. And is not defeated by an assignment for benefit of creditors. Caye v. Pool, 108 Ky. 124, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. 348.

[23] St. Louis &c. R. Co. v. Flannagan, 23 Ill. App. 489; Scarfe v. Morgan, 4 M. & W. 270; Georgia R. Co. v. Murrah, 85 Ga. 343, 11 S. E. 779 (not liable if they are lost or destroyed without fault of negligence on its part).

[24] Western Transp. Co. v. Barber, 56 N. Y. 544; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423. Safer, perhaps, in its own name.

[25] Eddy, The, 5 Wall. (U. S.) 481, 18 L. ed. 486; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177; Indianapolis &c. R. Co. v. Herndon, 81 Ill. 143; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238; Alden v. Carver, 13 Iowa 253, 81 Am. Dec. 430; Compton v. Shaw, 1 Hun (N. Y.) 441; Western Transp. v. Barber, 56 N. Y. 544.

their sale to satisfy its lien,[26] but it can not, in the absence of statutory authority, proceed to sell them without a judicial decree,[27] except, perhaps, in case of necessity. There are, however, statutes in many of the states providing for the sale of goods to satisfy the lien of the carrier without resorting to the courts.[28] The provisions of the governing statute should be carefully followed in such a case and the sale fairly conducted.[29] So, where the goods are of a perishable character and the consignee will not accept them,[30] or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity in the particular case.[31] The carrier is not, however, confined to its lien for the collection of its charges. It may

[26] Crass v. Memphis &c. R. Co., 96 Ala. 447, 11 So. 480, 55 Am. & Eng. R. Cas. 659. See also Indianapolis &c. R. Co. v. Herndon, 81 Ill. 143; Westmoreland v. Foster, 60 Ala. 448; Rankin v. Memphis &c. Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

[27] Hall v. Ocean Ins. Co., 37 Fed. 371; Gracie v. Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696; Hunt v. Haskell, 24 Maine 339, 41 Am. Dec. 387; Briggs v. Boston &c. R. Co., 88 Mass. 246, 83 Am. Dec. 626; Fox v. McGregor, 11 Barb. (N. Y.) 41; Myers v. Baymore, 10 Pa. St. 114, 49 Am. Dec. 586; Lickbarrow v. Mason, 6 East 21 note; Wilson v. Dickson, 2 Barn. & Ald. 2; Jones v. Pearle, 1 Strange, 556. See also Liefert v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. 899. The purchaser would not get a good title.

[28] See in case of perishable goods Rankin v. Memphis &c. Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339. See 13 Am. & Eng. Ency. of Law, 580, et seq. for a synopsis of the provisions of many of statutes.

[29] Nathan Bros. v. Shivers, 71 Ala. 117, 46 Am. Rep. 303; Martin v. McLaughlin, 9 Colo. 153, 10 Pac. 806; Central &c. R. Co. v. Chicago &c. Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. 87; Adams Exp. Co. v. Schlessinger, 75 Pa. St. 246; North v. London &c. R. Co., 14 C. B. N. S. 132, 32 L. J. C. P. 156; Field v. Newport &c. R. Co., 3 H. & N. 409, 27 L. J. Exch. 396; Gulf &c. R. Co. v. North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567. Consignee is held entitled to the overplus in Spurlock v. Missouri &c. R. Co. (Tex. Civ. App.), 90 S. W. 1124.

[30] Rankin v. Memphis &c. Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339.

[31] Notara v. Henderson, L. R. 5 Q. B. 346; Butler v. Murray, 30 N. Y. 88, 88 Am. Dec. 355; Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406. See also Dudley v. Chicago &c. R. Co., 58 W. Va. 604, 52 S. E. 718, 720, 112 Am. St. 1027 (quoting text).

maintain an action at law to recover them, in a proper case, even if it has waived its lien.[32]

§ 2375 (1572.) Waiver and loss of lien.—The lien of the carrier is lost by an unconditional delivery or voluntary surrender of the goods upon which it was held.[33] But there may be a conditional delivery reserving the lien,[34] and if the delivery is obtained by fraudulent representations,[35] or if the possession of the goods is tortiously taken away from the carrier,[36] its lien is not waived. Nor is it waived either in whole or in part by a delivery of part of the property unless such is the intention of the parties. The

[32] See ante, § 2361; Texas &c. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011; Central of Ga. R. Co. v. Southern Ferro Concrete Co., 193 Ala. 108, 68 So. 981, Ann. Cas. 1916E, 376; Southern Cotton Oil Co. v. Southern Ry. Co., 147 Ga. 646, 95 S. E. 251; Galt v. Archer, 7 Gratt. (Va.) 307. See generally as to procedure and evidence in such actions. Texas &c. R. Co. v. Rucker, 38 Tex. Civ. App. 591, 88 S. W. 815; Battle v. Atkinson, 9 Ga. App. 488, 71 S. E. 775; Cleveland &c. R. Co. v. Rudy, 173 Ind. 181, 89 N. E. 951; New York &c. R. Co. v. York &c. Co., 215 Mass. 36, 102 N. E. 366; Heilbroner v. Hancock, 33 Tex. 714; Montpelier &c. R. Co. v. Macchi, 74 Vt. 403, 52 Atl. 960; Galt v. Archer, 7 Gratt. (48 Va.) 307.

[33] Egan v. Cargo of Laths, 43 Fed. 480; Beckwith v. Atlantic Coast Line R. Co., 72 Fla. 522, 73 So. 593; Gregg v. Illinois Cent. 37 Am. St. 238; Reineman v. Covington &c. R. Co., 51 Iowa 338, R. Co., 147 Ill. 550, 35 N. E. 343, 1 N. W. 619; Sears v. Wills, 4 Allen (Mass.) 212; New York Cent. R. Co. v. York &c. Co., 230 Mass. 206, 119 N. E. 855; Ilkeheimer v. Consolidated Tobacco Co. (N. J.), 59 Atl. 363; Lembeck v. Jarvis &c. Cold Storage Co., 69 N. J. Eq. 781, 63 Atl. 257; Geneva &c. R. Co. v. Sage, 35 Hun (N. Y.) 95; Bigelow v. Heaton, 4 Denio (N. Y.) 496; Lake Shore &c. R. Co. v. Ellsey, 85 Pa. St. 283; Bailey v. Quint, 22 Vt. 474.

[34] Eddy, The, 5 Wall. (U. S.) 481, 18 L. ed. 486; Bags of Linseed, 1 Black (U. S.) 108, 17 L. ed. 35; Costello v. Seven Hundred &c. Laths, 44 Fed. 105; McCullough v. Hellwig, 66 Md. 269, 7 Atl. 455; Cuff v. Ninety-five Tons of Coal, 46 Fed. 670.

[35] Bigelow v. Heaton, 4 Denio 496, 6 Hill (N. Y.) 43; One Hundred &c. Tons of Coal, 4 Blatchf. (U. S.) 368; Hays v. Riddle, 1 Sandf. (N. Y.) 248; Wallace v. Woodgate, Ryan & M. 193. But see Lembeck v. Jarvis Terminal &c. Co., 68 N. J. Eq. 492, 59 Atl. 360.

[36] Boggs v. Martin, 13 B. Mon. (Ky.) 239. See also Lane v. Old Colony &c. R. Co., 14 Gray (Mass.)

whole amount of the freight is a lien upon each and every part of the goods, and, while the delivery of a part releases the lien upon that part it does not operate as a waiver of the lien upon the balance for the entire amount of the freight due upon all the goods.[37] A refusal to deliver the goods upon other grounds, without asserting or claiming any lien, has been held to be a waiver of the carrier's right to detain them on the ground that it has a lien on them for its freight.[38] So, it has been held that the carrier waives its lien by suing out an attachment and causing it to be levied on the same property.[39] It may also be waived by giving credit in the contract of carriage beyond the time when the property is to be delivered and placed out of the carrier's possession and control.[40] But this is true only when the contract or stipulation is clearly inconsistent with the idea that the freight is to be paid as a condition precedent to delivery or that the carrier is to have its lien, for the presumption is in favor of its existence, in the absence of

143. Thus, where the owner took them without the carrier's consent it was held that the lien was not lost. Hahl v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080.

[37] New Haven &c. Co. v. Campbell, 128 Mass. 104, 35 Am. Rep. 360; Lane v. Old Colony R. Co., 14 Gray (Mass.) 143; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Fuller v. Bradley, 25 Pa. St. 120. See also Philadelphia &c. R. Co. v. Dows, 15 Phila. (Pa.) 101; Chicago &c. R. Co. v. Northwestern &c. R. Co., 38 Iowa 377; Fox v. Holt, 36 Conn. 558; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919; Sodergren v. Flight, 6 East 622 note, and compare New York &c. R. Co. v. Sanders, 134 Mass. 53. A partial delivery will not be deemed a constructive delivery of all, so as to waive the carrier's lien, unless such was the intention of the parties, and that is usually a question of fact. Boggs v. Martin, 13 B. Mon. (Ky.) 239; New Haven &c. Co. v. Campbell, 128 Mass. 104, 35 Am. Rep. 360.

[38] Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. 315, 40 Am. & Eng. R. Cas. 151; Lehigh v. Mobile &c. R. Co., 58 Ala. 165. See also Louisville &c. R. Co. v. McGuire, 79 Ala. 395; Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612.

[39] Wingard v. Banning, 39 Cal. 543.

[40] Raymond v. Tyson, 17 How. (U. S.) 53, 15 L. ed. 47; Pinney v. Wells, 10 Conn. 104; Chandler v. Belden, 18 Johns (N. Y.) 157, 9 Am. Dec. 193; Chase v. Westmore, 5 M. & S. 180; Alsager v. St. Katherine's Dock Co., 14 M. & W. 794; Tomvaco v. Simpson, 19 Com. B. N. S. 453; L. R. 1 C. P. 363.

anything to the contrary, and the carrier will not be deprived of the security which is thus afforded it, unless the terms of the agreement, or other circumstances, are clearly inconsistent with the retention of the goods for that purpose.[41] As the lien of the carrier for freight is only co-extensive with his right to recover therefor, it seems that he may lose his lien by injury to the goods for which he is liable to such an extent that the damages equal or exceed the freight charges,[42] and it is expressly held in a recent case that "where a common carrier becomes liable to the consignee of goods for damages to the property received in transit, and the amount of such damages equals or exceeds the freight bill on the damaged goods, the lien of the carrier is thereby extinguished, and the consignee is entitled to the possession of such goods without payment of freight, and in such a case refusal of the carrier to deliver the goods to the consignee upon demand constitutes a conversion."[43]

[41] Schooner Volunteer, The, 1 Sumn. (U. S.) 551; The Kimball, 3 Wall. (U. S.) 37, 18 L. ed. 50; Bird of Paradise, The, 5 Wall. (U. S.) 545, 18 L. ed. 662; Howard v. Macondray, 7 Gray (Mass.) 516; Crawshay v. Honfray, 4 B. & Ald. 50; Tate v. Meek, 8 Taunt. 280. See further as to what is not a waiver or discharge. Caye v. Pool's Assignee, 108 Ky. 124, 21 Ky. L. 1600, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. 348; Pioneer Fuel Co. v. McBrier, 84 Fed. 495; McEachran v. Grand Trunk R. Co., 115 Mich. 318, 73 N. W. 231.

[42] Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350. See also Missouri Pac. R. Co. v. Peru &c. Imp. Co., 73 Kans. 295, 87 Pac. 80, 85 Pac. 408, 6 L. R. A. (N. S.) 1058, 117 Am. St. 468, 9 Ann. Cas. 790; Miami Powder Co. v. Port Royal R. Co., 47 S. Car. 324; 25 S. E. 153, 58 Am. St. 880; Ewart v. Kerr, Rice (S. Car.) 203, 2 McMull. (S. Car.) 141; Moran v. Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 50, 1101. And loss of possession by carrier's own negligence has been held equivalent to voluntary delivery and loss of lien. Norfolk &c. R. Co. v. Barnes, 104 N. Car. 25, 10 S. E. 83, 5 L. R. A. 611.

[43] Missouri Pac. R. Co. v. Peru &c. Co., 73 Kans. 295, 87 Pac. 80, 85 Pac. 408, 6 L. R. A. (N. S.) 1058n, 9 Ann. Cas. 790. But compare Wilensky v. Central of Ga. Ry. Co., 136 Ga. 889, 72 S. E. 418, Ann. Cas. 1912D, 271 and note.

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